

THE ALL INDIA REPORTER

1914

BOMBAY SECTION

CONTAINING

FULL REPORTS OF ALL REPORTABLE JUDGMENTS OF
THE BOMBAY HIGH COURT REPORTED IN

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| (1) I. L. R. 38 BOMBAY | (2) 16 BOMBAY LAW REPORTER |
| (3) 15 CRIMINAL LAW JOURNAL | (4) 22 to 25 INDIAN CASES |

CITATION : A. I. R. 1914 BOMBAY

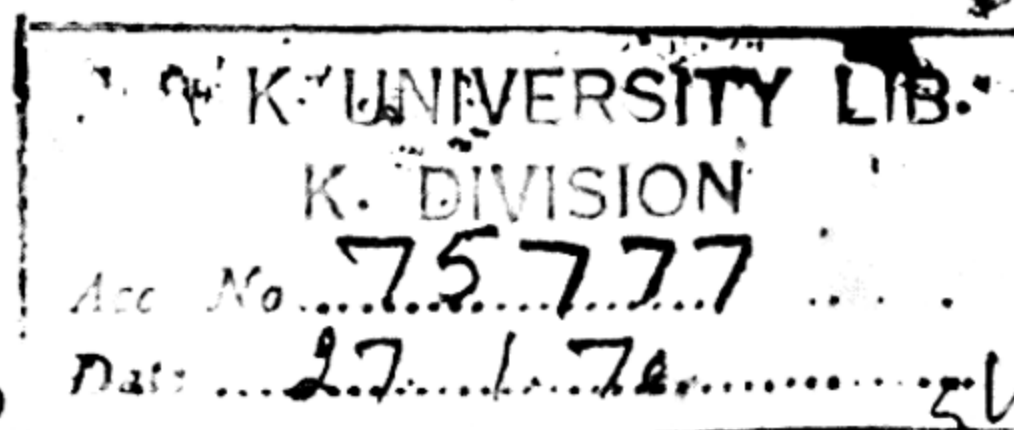
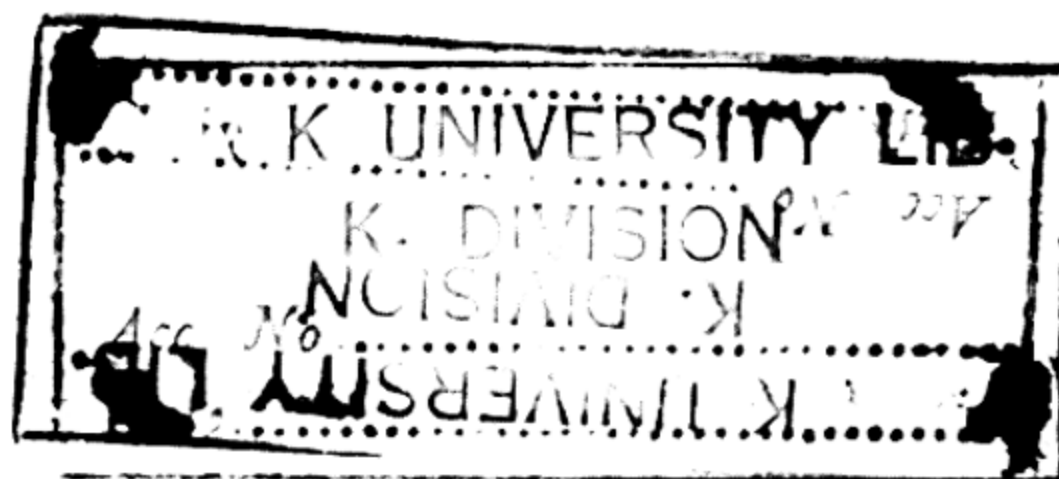
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BOMBAY HIGH COURT

1914

Chief Justices :

The Hon'ble Sir Basil Scott, Kt.

" " Sir Dinsha D. Davar, Kt. (Acting)

Puisne Judges :

The Hon'ble Sir S. L. Batchelor, Kt.

" " " Dinsha D. Davar, Kt.

" " Mr. F. C. O. Beaman.

" " " J. J. Heaton.

" " " N. C. Macleod.

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Vakil High Court
SERINAGAR (Kashmir)

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S. N. Vakil
Vakil H. S. Sauri
SRINAGAR (Kashmir)

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*** Indicates Cases of Great Importance.**

*** * Indicate Cases of Very Great Importance.**

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THE ALL INDIA REPORTER

1914 BOMBAY

COMPARATIVE TABLES

(PARALLEL REFERENCES)

Hints for the use of the following Tables

Table No. I.—This Table shows serially the pages of INDIAN LAW REPORTS for the year 1914 with corresponding references of the ALL INDIA REPORTER.

Table No. II.—This Table shows serially the pages of other REPORTS and JOURNALS for the year 1914 with corresponding references of the ALL INDIA REPORTER.

Table No. III.—This Table is the converse of the First and Second Tables. It shows serially the pages of the ALL INDIA REPORTER 1914 with corresponding references of all the JOURNALS including the INDIAN LAW REPORTS.

TABLE No. I

Showing Serially the pages of LAW REPORTS, INDIAN APPEALS and INDIAN LAW REPORTS Bombay series for the year 1914, with corresponding references of the ALL INDIA REPORTER.

N. B.—Column No. 1 denotes pages of I. L. R. 38 Bombay.

Column No. 2 denotes corresponding references of the ALL INDIA REPORTER.

I.L.R. 38 Bombay=All India Reporter

ILR)	A. I. R.	ILR)	A. I. R.	ILR)	A. I. R.	ILR)	A. I. R.	ILR)	A. I. R.
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N B.—Column No. 1 denotes pages of other JOURNALS.

Column No. 2 denotes corresponding references of the ALL INDIA REPORTER.

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15 Cr. L. J. & 22 to 25 Indian Cases=All India Reporter.

Cr. L. J. & I.C.	A. I. R.	Cr. L. J. & I.C.	A. I. R.	Cr. L. J. & I.C.	A. I. R.	Cr. L. J. & I.C.	A. I. R.	Cr. L. J. & I.C.	A. I. R.
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Please refer to COMPARATIVE TABLE No. II in A. I. R. 1914 Lahore.

TABLE No. III

Showing serialim the pages of the ALL INDIA REPORTER, 1914 BOMBAY SECTION with corresponding references of other REPORTS, JOURNALS AND PERIODICALS, including the INDIAN LAW REPORTS.

N.B.—Column No. 1 denotes pages of the ALL INDIA REPORTER, 1914 BOMBAY. Column No. 2 denotes corresponding references of other REPORTS, JOURNALS AND PERIODICALS.

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1 33 Bom 416	33 38 Bom 293	39 Bom 29	138FB 38 Bom 642
23 IC 513	23 IC 779	16 BL R 616	25 IC 383
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2 23 IC 505	36(1) 23 IC 730	25 IC 37	15 Cr L J 581
15 Cr L J 297	15 Cr L J 362	16 BL R 459	38 Bom 177
16 BL R 87	16 BL R 200	39 Bom 168	23 IC 353
3 23 IC 503	36(2) 38 Bom 392	26 IC 607	16 BL R 20
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4 23 IC 500	33 23 IC 912	16 BL R 763	16 BL R 213
15 Cr L J 292	16 BL R 263	16 BL R 723	27 IC 56
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5 23 IC 476	15 Cr L J 433	38 Bom 183	39 Bom 339
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16 BL R 138	42 38 Bom 381	15 BL R 1133	16 BL R 954
6 38 Bom 421	24 IC 625	27 IC 594	38 Bom 240
23 IC 373	16 BL R 288	16 BL R 719	23 IC 786
16 BL R 195	38 Bom 377	38 Bom 638	16 BL R 132
8FB 38 Bom 309	24 IC 665	25 IC 371	39 Bom 191
23 IC 325	16 BL R 33	16 BL R 517	25 IC 241
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15 33 Bom 372	24 IC 716	16 BL R 683	39 Bom 119
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16 BL R 35	39 Bom 316	39 Bom 55	16 BL R 76
17 23 IC 565	23 IC 880	27 IC 613	38 Bom 659
16 BL R 224	16 BL R 252	16 BL R 718	25 IC 380
21 24 IC 164	38 Bom 576	26 IC 749	16 BL R 525
15 Cr L J 428	24 IC 730	16 BL R 766	23 IC 735
16 BL R 259	16 BL R 236	22 IC 153	16 BL R 203
22 27 IC 573	38 Bom 449	15 Cr L J 14	15 Cr L J 367
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23 38 Bom 331	15 BL R 1044	27 IC 890	16 BL R 774
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23 IC 121	38 Bom 565	15 Cr L J 522	38 Bom 272
16 BL R 26	23 IC 765	39 Bom 331	23 IC 221
26 38 Bom 615	16 BL R 104	27 IC 335	16 BL R 164
23 IC 441	38 Bom 724	16 BL R 730	38 Bom 687
16 BL R 211	27 IC 51	38 Bom 444	27 IC 46
27 38 Bom 194	16 BL R 663	25 IC 73	16 BL R 653
23 IC 123	27 IC 134	16 BL R 454	38 Bom 224
16 BL R 30	16 BL R 670	38 Bom 219	22 IC 292
28 23 IC 599	39 Bom 563	22 IC 284	15 BL R 1142
16 BL R 57	26 IC 906	15 BL R 1129	38 Bom 200
29 23 IC 733	16 BL R 977	39 Bom 175	20 IC 859
15 Cr L J 365	33 Bom 613	26 IC 754	15 BL R 748
16 BL R 202	25 IC 369	16 BL R 778	38 Bom 111
30 33 Bom 340	16 BL R 516	38 Bom 438	21 IC 893
23 IC 617	39 Bom 34	23 IC 944	15 BL R 994
16 BL R 75	26 IC 265	16 BL R 283	14 Cr L J 653
31 24 IC 437	16 BL R 620	27 IC 362	39 Bom 16
16 BL R 204	38 Bom 597	16 BL R 743	25 IC 264
32 38 Bom 337	25 IC 411	38 Bom 667	16 BL R 508
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16 BL R 72	26 IC 444	16 BL R 233	

A. I. R. 1914 Bombay=Other Journals—(Concl'd.)

A.I.R.)Other Journals				A.I.R.)Other Journals				A.I.R.)Other Journals				A.I.R.)Other Journals			
	28	I C	130	225(1)	27	I C	159		16	B L R	692	283	38	Bom	10
	16	B L R	577		16	B L R	951	252	38	Bom	673		21	I C	50
193	28	Bom	120		16	Cr L J	111		26	I C	266		15	B L R	805
	20	I C	533	225(2)	38	Bom	344		16	B L R	637	284	38	Bom	37
	15	B L R	684		21	I C	694	253	27	I C	33		21	I C	320
195	28	I C	121		15	B L R	948		38	Bom	665		15	B L R	845
	16	B L R	566	230	27	I C	155		16	B L R	641	286	38	Bom	618
197	28	Bom	656		16	B L R	947	254	38	Bom	679		28	I C	114
	25	I C	67		16	Cr L J	107		28	I C	127		16	B L R	534
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	16	Cr L J	98	232	39	Bom	310		15	B L R	848	290	21	I C	343
198(2)	38	Bom	116		27	I C	147	258	26	I C	1000		38	Bom	255
	21	I C	847		16	B L R	678		16	B L R	939		15	B L R	890
	15	B L R	1034		16	Cr L J	99		16	Cr L J	88	294	27	I C	523
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	16	B L R	943		20	I C	469		16	B L R	645	296	21	I C	763
	16	Cr L J	91		15	B L R	405	260	39	Bom	513		38	Bom	53
200	39	Bom	41	237	38	Bom	114		26	I C	896		15	B L R	1016
	27	I C	249		21	I C	657		16	B L R	972	299	25	I C	375
	16	B L R	687		15	B L R	999	263(1)	38	Bom	32		38	Bom	631
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	25	I C	66	238	39	Bom	131		15	B L R	841	300	21	I C	350
	16	B L R	441		27	I C	350	263(2)	39	Bom	58		38	Bom	94
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	27	I C	167		27	I C	165		21	I C	313	302(2)	27	I C	238
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	15	B L R	936		15	B L R	876		16	B L R	754		16	B L R	964
211(2)	38	Bom	125	245(1)	39	Bom	165	267(2)	27	I C	34	305	21	I C	673
	20	I C	492		26	I C	606		16	B L R	643		38	Bom	156
	15	B L R	593		16	B L R	755	268	38	Bom	24		15	B L R	975
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BOMBAY HIGH COURT

A. I. R. 1914 Bombay 1

HEATON AND SHAH, JJ.

Narayan Purshottam Gargote—Applicant.

v.

Laxmibai Datto Bhagwan and others
—Opponents.

Extraordinary Civil Appln. No. 92 of 1913, Decided on 6th January 1914, from order of Dist. Judge, Satara, in Misc. Appln. No. 74 of 1912.

Civil P. C. (5 of 1908), O. 47, R. 1—(Per *Shah, J.*)—Court's jurisdiction to hear application for review cannot be taken away by appeal preferred (*Heaton, J., dubitante*).

Per *Shah, J.*—Where an application for review has been presented by a party to a suit and an appeal is preferred, the Court to which the application for review is made is not thereby deprived of jurisdiction to entertain the application: 32 *Mad.* 416 (F.B.), *Foll.* (*Heaton, J., dubitante*).
[P 2 C 1]

Jayakar and *S. Y. Abhyankar*—for Applicant.

P. D. Bhide and *V. V. Bhadkamkar*—for Opponents.

Shah, J.—This application arises under the following circumstances:

The District Court of Satara having decided Appeals Nos. 67 and 70 of 1911 on its file against the plaintiff, he presented an application for review to that Court on 10th October 1912. A rule nisi was granted on 12th October and on 14th October he filed a second appeal in this Court against the decree of the lower appellate Court. He also informed the Registrar, while filing the appeal, that he wanted the appeal to be kept pending until his review application to the lower appellate Court was disposed of.

The District Court has rejected the review application on two preliminary grounds without going into the merits of the application. One of the grounds is

that certain copies which ought to have been filed with the application were not filed, and that the application could not therefore be entertained. Without expressing any opinion as to whether it was necessary to file those certified copies with the application, I am clearly of opinion that when the Court admitted the application on 12th October with full knowledge of the fact that the copies were not filed along with the application the omission was sufficiently condoned. It would not therefore, be right to disallow the application on that ground.

The second ground, which has been the main contention between the parties on this application, is that the applicant having preferred an appeal to this Court the lower Court had no jurisdiction to proceed with the application for review. This point has been fully argued before us and several cases have been cited. I do not propose however, to discuss the cases in detail. It is common ground that at the date of the presentation the application was in order and that the lower Court had jurisdiction to entertain it. It is argued however that that jurisdiction came to an end as soon as the plaintiff preferred a second appeal to this Court. The only decision which covers this point is the case of *Chenna Reddi v. Pedda Obi Reddi* (1). On a full consideration of the arguments on either side of the question, I have come to the conclusion that this Full Bench decision should be followed. Accepting that view, it is clear that the learned District Judge was not right in rejecting the application on the preliminary ground raised by the defendants. There is no decision cited to us except the case of *Ramana-*

(1) [1909] 2 I.C. 802=32 *Mad.* 416 (F.B.).

dhan Chetti v. Narayan Chetti (2), [which in terms has been overruled by the decision in *Chenna Reddi's* case (1)], that can be said to be in any way inconsistent with the view taken by the Madras High Court. In a matter of this kind, I think, it is desirable that the practice of different High Courts should be uniform as far as possible, and I see no reason whatever to think that the practice in this Presidency has been in fact different or that it ought to be different. Apart from the decided cases, I think, on a fair reading of the provisions of the Civil Procedure Code relating to this point, it is clear that an application for review can be made before any appeal is filed by the party and I know of no reason why an application, which was perfectly competent at the date of the presentation should not be disposed of on the merits. There certainly is no express provision in the Court which renders the application incompetent on the mere presentation of an appeal by the same party at any subsequent time. In my opinion there is no practical inconvenience so long as the appeal is not prosecuted during the pendency of the review application. The present case fairly illustrates that it is only by following the practice, which has been sanctioned by the Madras High Court, that the remedy by way of review can be secured to the aggrieved party in an appropriate case, without requiring him to jeopardize his right of second appeal.

On these grounds the rule should be made absolute and the lower Court directed to dispose of the application on the merits.

Costs throughout to be costs in the application.

Heaton, J.—I concur in the order proposed. It does not seem to me that this matter involves any really important legal principle or that for practical purposes it is anything more than a matter of practice. The practice which, as I understand, at present is followed, is that which was followed by the applicant in this case. He applied for a review first and afterwards he appealed. Regarding this, as a matter of practice, I can see nothing in it to object to, nothing that is in any way inconvenient to, or inconsistent with, the proper, ordi-

nary administration of justice. Therefore I see no reason to press my own view of the meaning of R. 1, O. 47.

I should only like to add this, that I think there is great force in the reasoning of the District Judge. Personally also I am not at all satisfied that the conclusion reached by the Full Bench of the Madras High Court in the case of *Chenna Reddi v. Pedda Obi Reddi* (1) is really correct. But for the reasons I have stated I consider my own personal opinion in these matters as of no particular importance. Therefore I concur in the order which my learned colleague has proposed.

G.P./R.K. :

Rule made absolute.

A. I. R. 1914 Bombay 2

HEATON AND SHAH, JJ.

Pandurang Balkrishna — Accused — Applicant.

v.

Emperor — Opposite Party.

Criminal Revn. Appln. No. 408 of 1913
Decided on 9th January 1914, from an order of Dist. Magistrate, East Khadesh.

Press Act (1 of 1910), S. 3, Cl. (i) and S. 23 — Owner of printing press and printing newspaper making declarations under Press Act (25 of 1867), Ss. 4 and 5 — Magistrate dispensing with deposit of security under S. 3 (1)—Security for newspaper demanded later — Newspaper stopped but press continued—Conviction of accused under S. 23 (1) held to be illegal— Press Act (25 of 1867), Ss. 4 and 5.

The accused, who owned a printing press and printed a newspaper, made declarations under Ss. 4 and 5, Act 25, 1867 after coming into force of Act 1 of 1910 dispensing with the deposit of any security. Later on the Magistrate required security for the newspaper. The accused stopped publishing the newspaper but used the press. For this use of the press the accused was convicted under Cl. (i), S. 23, Act 1, 1910.

Held, that the conviction could not be upheld for Cl. (1), S. 23, Act 1, 1910 covers the disobedience of an order under S. 3 or S. 5, Press Act and the order disobeyed was not such an order. [P 3 C 1]

D. A. Khare and *P. D. Bhide* — for Applicant.

S. S. Patkar—for the Crown.

Judgment.—In this case we only deal with the particular point which we decide.

The applicant had since the coming into force of Act 1, 1910 made declarations under Ss. 4, and 5, Act 25, 1867. The Magistrate had made an order under

the proviso to Cl. 1, S. 3, Act 1, 1910 dispensing with the deposit of any security. Subsequently the Magistrate, for reason with which we need not concern ourselves, came to the conclusion that he would cancel that order and require security. He did this by an order dated the 6th August 1912, but in requiring security he did not require it for the purpose contemplated by S. 3, Cl. 1, that is to say, he did not require it in respect of the press but in respect of the newspaper which was published at the press and he directed accordingly. After that time the newspaper was not published, but the press was used. For this use of the press applicant was prosecuted for an offence under Cl. 1, S. 23, Act 1, 1910. That clause only covers the disobedience of an order under S. 3 or S. 5. The order which was disobeyed, if it be assumed that there was disobedience, was not an order covered by either S. 3 or by S. 5. Therefore, the conviction cannot stand. As a matter of fact there is no substance in this case. Therefore it is quite unnecessary to inquire whether it would be possible to show that there might be a justifiable conviction under some other section of the Act.

For these reasons we set aside the conviction and sentence and direct the fine if paid, to be refunded.

G.P./R K. *Conviction set aside.*

A. I. R. 1914 Bombay 3

HEATON AND SHAH, JJ.

In re Mir Husen Abdul Rahiman—
Petitioner.

Criminal Revn. No. 319 of 1913, Decided on 4th December 1913, from order of Second Class Magistrate, Khalapur.

(a) Criminal P.C. (1898), Ss. 514 and 529—Bond for appearance given—Non-appearance of accused—Notice to show cause why bond should not be forfeited issued—Case transferred to another Magistrate—Forfeiture of bond held not to be within jurisdiction of transferee Magistrate.

Where the accused gave a personal bond for appearance before a Magistrate and failed to appear before him on the date fixed and a notice was issued to him to show cause why the bond should not be forfeited and in the meantime the case was transferred to another Magistrate.

Held: that the latter Magistrate had no jurisdiction to order the forfeiture of the bond under S. 514. [P 3 C 2]

(b) Criminal P. C. (1898), S. 531—S. 531 cures defect only as to local jurisdiction.

Section 531 relates only to proceedings in a wrong place and cures defects as to local jurisdiction. [P 3 C 2]

B. V. Desai—for Petitioner.

S. S. Patkar—for the Crown.

Shah, J.—This is an application for the revision of an order made under S. 514, Criminal P. C., by the Second Class Magistrate of Khalapur ordering the petitioner's recognizance bond to be forfeited and directing him to pay Rs. 25 as penalty. Admittedly the bond in question was taken by the Second Class Magistrate at Karjat for appearance before him and the default in appearance had taken place before that Magistrate. The notice to the petitioner to show cause was issued by the Magistrate at Karjat, and the subsequent proceedings with reference to the bond under S. 514 of the Code were before the Magistrate at Khalapur.

The learned District Magistrate in appeal was of opinion that legally the forfeiting Magistrate was not empowered under S. 514, Criminal P. C., but that irregularity was cured by S. 531 of the Code.

I think that the Magistrate at Khalapur had no jurisdiction to make the order under S. 514, as he was not the Magistrate who had taken the bond or before whom the petitioner had to appear on the date of the default. S. 531, in my opinion, has no application to this case. It only relates to proceedings in a wrong place and cures defects as to local jurisdiction. It does not touch a case of this kind where under the specific provisions of S. 514 only a particular Court is empowered to make the order. Such an order is not included in the specific things mentioned in S. 529 of the Code. It is quite true that it is not mentioned specifically in S. 530 of the Code, but in the absence of any provision which could cure such a defect of jurisdiction as we have in the present case, I am of opinion that the order should not be allowed to stand. The learned District Magistrate has referred to S. 530, Cl. (9), as suggesting that the proceedings taken by a Magistrate under S. 514 not duly authorized would not be void. But, in my opinion, the reference is not right. This is really a case of a particular Court being authorized to deal with a particular

matter, and there is no provision in the Code which could excuse a departure from a specific provision of that character.

The learned Government Pleader has relied upon S. 537 of the Code in support of the argument that it is merely an irregularity, and no failure of justice having been occasioned thereby, the order should not be set aside. But the section contemplates an order passed by a Court of competent jurisdiction, and as the order in this case has not been made by a Court of competent jurisdiction, in my opinion, S. 537 has no application.

Therefore without going into the question as to whether there has been any failure of justice in consequence of the Magistrate at Khalapur having made the order, I am of opinion that the order should be set aside as having been made without jurisdiction. The penalty, if recovered, should be refunded.

Heaton, J.—I am of the same opinion. It is quite plain that the Magistrate had no jurisdiction to inflict this penalty and his want of jurisdiction is not one of those matters which is cured by any provision of the Criminal Procedure Code.

G.P./R.K.

Order set aside.

A. I. R. 1914 Bombay 4

HEATON AND SHAH, JJ.

Gendalal Chimanbhai—Accused—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. Appln. No. 323 of 1913, Decided on 26th November 1913, from order of Dist. Mag., Nasik.

Criminal P. C. (1898), S. 436—Accused, discharged by First Class Magistrate holding inquiries into offences under Ss. 408 and 477-A Penal Code, was committed to Sessions by District Magistrate under S. 436 on same charges — Accused applied to High Court stating that case under S. 408 was not triable by Sessions Court—District Magistrate held competent to commit and add charge under S. 408 if connected with charge under S. 477-A.

Where a Magistrate of the First Class after holding an inquiry into offences under Ss. 408 and 477-A, Penal Code, discharged the accused, and the District Magistrate acting under S. 436 committed the accused to the Court of Session on the same charges and the accused applied to the High Court contending that the order of the District Magistrate was without justification, as primarily the case against

him was under S. 408 which was not triable ordinarily by the Court of Sessions ;

Held : (1) that the District Magistrate was competent to commit the accused as in this case the charge of falsification of accounts was one of the substantial things against the accused. [P 4 C 2]

(2) That the District Magistrate could add a charge under S. 408 if it was so intimately connected with the charge under S. 477-A as to form part of the same transaction.

[P 4 C 2 ; P 5 C 1]

Jinnah and *P. D. Bhide*—for Applicant.

K. N. Koyajee—for Complainant.

S. S. Patkar—for the Crown.

Heaton, J.—In this case the applicant has been committed to the Court of Sessions by the District Magistrate of Nasik acting under the powers conferred upon him by S. 436, Criminal P. C. The applicant had previously been discharged by a Magistrate.

On the merits of these orders I shall not say a word, I mean on the merits in so far as they are affected by the evidence in the case and considerations arising purely out of the evidence. It is however contended that the District Magistrate was without authority to make this order, because the case against the applicant is primarily one of criminal misappropriation or breach of trust, and such a case is not triable exclusively by the Court of Sessions. However the accusation against him is that this criminal misappropriation was enabled to be done or was concealed or facilitated by making false entries in accounts. That is, the falsification of accounts was not only a substantial part of the affair, but so substantial and so necessary that the misappropriation could not have been effected in the way it was done without this falsification. Therefore I am quite satisfied that the case was one in which the District Magistrate had jurisdiction under S. 436 ; that is to say, it was a case in which it was open to him to consider that the case was triable exclusively by the Court of Sessions. But it is contended even if that be so, yet although the District Magistrate might have authority to commit on a charge under S. 477-A, I.P.C., he could still be without authority to add a charge under S. 408. Personally I hold that provided the commitment under S. 477-A is a proper commitment it opens up the whole case and the District Magistrate

can, if so minded, add a charge under S. 408, if the charge under S. 403 is so intimately connected with the charge under S. 477-A as to form part of the same transaction. If however the charge as framed is liable to other criticisms, that is a matter which can be brought to the consideration of the Sessions Judge who will have trial of the case, for on him rests the ultimate responsibility of settling the charge on which this applicant will come to trial.

I am not at all unmindful that we have to be very cautious in dealing with S. 436 so as not to allow the power to commit to be used where the offence triable exclusively by the Court of Sessions is not the substantial thing or not one of the really substantial things against an accused person. But here, as I have said, I am quite satisfied that the charge of falsification of accounts is one of the substantial things against the accused.

Therefore I should discharge the Rule.

Shah, J.—I agree that the Rule should be discharged.

In this case the District Magistrate has come to the conclusion that the accused has been improperly discharged by the enquiring Magistrate and under the circumstances of this case he considers that the case is exclusively triable by the Court of Sessions.

Both the conditions required by S. 436 being satisfied, I am of opinion that it was open to him to make an order of commitment under the section. I do not desire to say anything on the merits of the case in spite of the fact that an attempt has been made in the course of the arguments to show that the order of discharge by the trial Magistrate was proper, particularly as the whole evidence will have to be considered at the trial by the Sessions Court. I confine myself to the consideration of the legal argument urged that the order was not justified by the terms of the section.

G.P./R.K.

Rule discharged.

*** A. I. R. 1914 Bombay 5**

HEATON AND SHAH, JJ.

Jivanatha and others — Accused—Applicants.

v.

Emperor — Complainant — Opposite Party.

Criminal Revn. Appln. No. 396 of 1913, Decided on 6th February 1914, from order of Sub-Divisional Mag., Kaira.

*** Criminal P. C., (1898), S. 112—Qualifications of sureties for good behaviour stated—Condition that surety must be capable of controlling accused is undesirable.**

Sureties of good behaviour ought not to be rejected merely on the ground that they are caste-fellows or relatives of the accused. The condition that a surety for good behaviour must be capable of controlling the accused is on general grounds undesirable and open to a practical objection, but the condition that he should be of the land-holding class is unobjectionable. [P 5 C 2]

G. N. Thakore—for Applicants.

S. S. Patkar—for the Crown.

Heaton, J.—The applicants were called on to give security under S. 112, Criminal P. C., and afterwards an order was made under S. 118. We are not now concerned with the order so far as it requires security beyond this, that we see no ground to interfere in that matter. But the sureties were required to fulfil two conditions : first, that they should be of the land-holding class, and to that we see no objection : secondly, that they should be able to control the persons for whom they were sureties. To that condition I do see objection—not a theoretical objection, because it is true that underlying the idea of a surety is the idea that he should be able in some way to control the person for whom he stands surety. The objection is a practical one. If this condition is expressly described in such terms as were adopted in this case, it is likely to lead to very serious hardship, e. g., those persons, who *prima facie* would most probably be able to control another, are his relatives, his caste-fellows, and those who are closely associated with him. Yet we find the fact of being of the same caste and of being a relative is regarded as a disqualification for a surety. So that in practice this condition seems to me not only to be likely to lead to undesirable results but almost certain to do so. In this very case, for instance, though several sureties were

offered, they were at first, all off them, refused, and the result was that these men were in jail for upwards of six months. After that they offered sureties who were accepted and the applicants were released from jail.

Now, this is undoubtedly an unfortunate result, especially as the intention of the law in the matter of sureties, for good behaviour and so forth, is not that the person called on to give sureties should be sent to jail, but that, if possible, he should be kept out of jail. I do not think the materials on the record enable me to criticize in detail the cases of the sureties who were rejected. The inquiry in such a matter is necessarily summary and its results are very briefly recorded. But I do think that this case appears to illustrate the inadvisability of prescribing such a condition as that under consideration. As I have said, on general grounds such a condition is undesirable, and I do not think that it is a condition of the kind which is contemplated by the words of S. 112.

I therefore think that this particular condition, that sureties must be capable of controlling the applicants, should be deleted.

Shah, J.—I agree that the condition requiring the sureties to be able to control the petitioners should be deleted. In this case several sureties were offered by the petitioners; but they were all rejected by the trial Magistrate. Some were rejected on the ground that they were caste-fellows or relatives of the petitioners. The result was that the petitioners were sentenced to one year's rigorous imprisonment and had to remain in jail for over six months until their sureties were accepted on 24th November 1913. The record shows that the petitioners apparently were men who were not unable to furnish sureties. It does not appear from the record that the sureties offered were not men of substance or that they did not belong to the land-holding class. In my opinion the Magistrate was not justified in refusing to accept certain persons as sureties merely on the ground that they were caste-fellows or relatives of the petitioners. It is not necessary to examine in detail the ground upon which other sureties were rejected. I feel satisfied on a careful examination of the record that the condition in question is

onerous and has been enforced with undue severity. This case illustrates that such a condition, if not enforced with due care and caution, is apt to operate harshly against the parties concerned. It may lead, as it has done in this case to the rejection of any number of sureties with the result that the provisions, which are designed to be preventive are easily turned to punitive purposes.

G.P./R.K.

Order accordingly.

A. I. R. 1914 Bombay 6

HEATON AND SHAH, JJ.

Gangappa Revanshiddappa Hundekar
—Applicant.

v.

Gangappa Malleshappa Hundekar and others—Opponents.

Civil Appln. No. 545 of 1913, Decided on 9th January 1914, for leave to appeal to His Majesty in Council.

(a) **Letters Patent (Bombay) (amended), Cl. 39**—Judgment or order to be final must finally determine rights of parties.

A judgment or order, in order to be final within the meaning of Cl. 39, must finally determine the rights of the parties. [P 8 C 2]

(b) **Civil P. C. (5 of 1908), S. 109**—High Court's order refusing legal representative to be brought on record is interlocutory—No appeal lies to King in Council under **Letters Patent (Bombay) (amended), Cl. 39**.

An order by a High Court rejecting the application of the legal representative of a deceased party to have his name brought on the record is not final but interlocutory, and as such no appeal lies to His Majesty in Council from such order under Cl. 39, Amended Letters Patent. [P 8 C 1]

Nilkanth Atmaram—for Applicant.

K. H. Kelkar, Setlur and G. S. Mulgaonkar—for Opponents.

Shah, J.—This is an application for leave to appeal to His Majesty in Council, arising under the following circumstances :

A suit was brought by one Gangappa Rudrappa Hundekar in the Court of the First Class Subordinate Judge at Bijapur, substantially to have it declared that he was the adopted son of the deceased Rudrappa Hundekar against Chanbasava kom Rudrappa and others. The suit was decided on 12th February 1909 in favour of the plaintiff. Chanbasava preferred Appeal No. 61 of 1909 to this Court against the decree in the said suit. On 7th August 1909 an application was made by one Virupakshappa

to be joined as a co-appellant with Chanbasava and to continue the appeal with her, alleging that he was adopted by Chanbasava on 12th May 1909. The application was granted on 13th August 1909 subject to any objections the respondents might have to urge at the hearing. Chanbasava is stated to have died about 15th October 1910; but apparently no application was made by anyone to be brought on the record as her legal representative. Virupakshappa died on 3rd July 1912.

One Gangappa Revanshidappa Hundekar made an application (No. 547 of 1912) to this Court to be brought on the record as the legal representative of the deceased Virupakshappa. He claimed to be his legal representative on the strength of a will said to have been executed by Virupakshappa. An issue was sent down to the lower Court as to the factum and validity of the alleged will. The lower Court recorded the evidence and returned its finding to this Court. The application was then heard by us with the result that the will of Virupakshappa was held not proved. We accordingly rejected the application on 29th August 1913. On the same day we granted the application of the natural heirs of Virupakshappa (Civil Application No. 572 of 1912) to be brought on the record as the legal representatives of Virupakshappa. The main appeal (No 61 of 1909) is still pending in this Court.

The petitioner (Gangappa Revanshidappa Hundekar) now applies to this Court for leave to appeal to His Majesty in Council against the order dated 29th August 1913.

It is not disputed in this case that the value of the subject-matter of the suit, and the value of the subject-matter on the proposed appeal, is far in excess of Rs. 10,000. The order, which is sought to be appealed from, involves questions respecting property exceeding Rs. 10,000 in value. It is not suggested by the petitioner that there is any substantial question of law. But it is argued that as the order of this Court does not affirm any decision of the lower Court it is not necessary that the proposed appeal should involve any substantial question of law. So far I think the argument is good. In this case there is no decision of the lower

Court, which this order can be said to affirm. The order is made on an application to this Court, with which the lower Court would have nothing to do in the ordinary course. An issue was sent down to the lower Court apparently for the convenience of the parties, to have the voluminous evidence recorded by that Court and a finding was called for. This finding or opinion is clearly not a decision of the lower Court within the meaning of S. 110, Civil P. C. Under O. 22, R. 5, read with S. 107, Civil P. C., it was the duty of this Court to determine the question. I am, therefore, of opinion that if the petitioner is otherwise entitled to appeal he has to satisfy only one condition under S. 110, Civil P. C., relating to the value of the property involved in the suit of the appeal and that the case fulfils that condition.

The important question that remains to be considered is, whether the petitioner is otherwise entitled to appeal to His Majesty in Council. It is conceded by the learned pleader for the petitioner that the order complained of is not covered by S. 109, Civil P. C. It is clear that Cls. (b) and (c) have no application and Cl. (a) does not apply, as the order is not passed on appeal at all. The appeal is still pending and no order is made thereon. This is only an order on an application in the appeal. But it is urged on behalf of the applicant that he has got a right to appeal to His Majesty in Council under Cl. 39, Amended Letters Patent. Under this clause any person may appeal to His Majesty in Council from any final judgment, decree or order of any Division Court from which an appeal shall not lie to this High Court under the provisions contained Cl. 15, Letters Patent. The order, no doubt, is an order of a division Court from which there is no appeal to this Court under Cl. 15, Letters Patent. The question therefore that remains to be considered is whether it is a final judgment or order within the meaning of Cl. 39. I think that this is not a final judgment or order as contemplated by the Letters Patent. It is an order made in a proceeding incidental to the appeal. It is an order which the Court can make under O. 22, Civil P. C., for the purpose of ascertaining the legal representatives of the deceased Viru-

pakshappa. The order does not affect the merits of the appeal and it certainly does not decide any matter in dispute between the parties to the appeal.

A final judgment or order has been thus described in Halsbury's Laws of England, Vol. 18, para. 490 :

"A judgment or order which determines the principal matter in question is termed 'final'. An order which does not deal with the final rights of the parties, but either (1) is made before judgment, and gives no final decision on the matters in dispute, but is merely on a matter of procedure; or (2) is made after judgment, and merely directs how the declarations of right already given in the final judgment are to be worked out, is termed 'interlocutory'."

* * * * * The decisions on the question whether an order is "final" or "interlocutory" therefore must be grouped with reference to the particular purpose for which each was given."

If we apply this test in the present case—and I see no reason why it should not be applied—it is clear that the order in question is not final but interlocutory. It decides no matter in appeal. It is made before judgment in appeal and gives no final decision on the matter in dispute but is merely on a matter of procedure. Even Virupakshappa's status is not finally determined yet. He was brought on the record as a co-appellant in 1909. In consequence of his death having occurred before any adjudication of his rights it became necessary to determine as to who should be allowed to occupy his place in the litigation for the purpose of continuing the appeal on his behalf. The matter in dispute between the parties would be obviously the matter in appeal and not in an incidental proceeding of this kind: see *Bozson v. Altrincham Urban District Council* (1). The observations of Sargent, C. J., in *Aben Sha Sabit Ali v. Cassirao Baba Saheb Holkar* (2) lend support to the conclusion that the order in question is not "final."

It appears to me that the result of holding the order to be final within the meaning of Cl. 39, Letters Patent, would be somewhat anomalous. If such a question had arisen during the pendency of the suit in the lower Court, and if an order such as we have made had been made by the trial Court, it is clear that no appeal could have been preferred against the order. This follows from the fact that no appeal is

provided by O. 43, R. 1, against such an order under O. 22, Civil P. C., while, according to the petitioner's contention, there could be an appeal to His Majesty in Council, when such an order is made by the High Court in a proceeding in an appeal arising out of the same suit. I do not think that such an anomaly exists.

It is also clear that a judgment or order in order to be final within the meaning of Cl. 39, Letters Patent, must finally determine the rights of the parties. In other words if it be not appealed from the adjudication must be final. In the present case it is not denied that in spite of this order, the petitioner is entitled either to apply for the probate of the will or to enforce his rights under the will by a separate suit. The adjudication is not therefore final.

It may be that the question of petitioner's right to represent the deceased Virupakshappa in this litigation is finally decided. But that is a matter of procedure. So far as the substantial rights of the petitioner are concerned it cannot be suggested that the adjudication is final.

For these reasons I refuse to grant the certificate prayed for and discharge the rule with costs.

Heaton, J.—I concur.

G.P./R.K.

Leave refused.

* * A. I. R. 1914 Bombay 8 Full Bench

SCOTT, C. J., BATCHELOR AND
DAVAR, JJ.

Kalyanchand Lalchand — Defendants
—Appellants.

v.

Sitabai Dhanasa — Plaintiff — Respondent.

First Appeal No. 220 of 1912, Decided on 5th November 1913, from decision of First Class, Sub-Judge, Nasik, in Suit No. 305 of 1910.

* * Civil P. C. (5 of 1908), S. 11—Contentious probate proceeding which is suit under Probate and Administration Act, S. 82, is also suit under S. 11—Finding of fact in probate proceedings is *res judicata* though such judgment is not judgment within Evidence Act (1 of 1872), S. 41.

As contentious probate proceedings must take the form of a suit in accordance with the provision of S. 83, Probate and Administration Act, such proceedings constitute a suit within the meaning of S. 11, Civil P. C., and therefore the finding of fact of a Probate Court in such

(1) [1909] 1 K. B. 547.

(2) [1881-82] 6 Bom. 260.

proceedings, that the testator was not of sound disposing mind when the alleged will was made, would operate as *res judicata* between the parties to the proceedings although the judgment in such proceedings would not be a judgment such as is contemplated in S. 41, Evidence Act, inasmuch as such judgment does not confer upon or take away from any person any legal character. [P 15 C 1]

Strangman and Kanga — for Appellants.

Raikes, Wadia, D. A. Khare and A. G. Desai — for Respondent.

Order of Reference

Beaman, J.—Dhanasa died in September 1905. He is alleged to have made a will within forty-eight hours of his death. The executors petitioned for probate in 1908. The widow Sitabai, plaintiff in this suit, opposed, alleging in general terms that there was no will. To understand the vagueness of her caveat it is necessary to state that at the time of her husband's death she was a minor. The executors averred that the will was executed in her presence. She therefore replies in her caveat that no such will was ever executed in her presence, and that what is now propounded as the genuine last will and testament of the deceased Dhanasa does not seem to be a genuine will. In the circumstances I do not see how she could have been expected to be more explicit, and I think that her contentions fairly raised all points upon which the genuineness of a will can be disputed.

The learned District Judge refused probate clearly on the ground that the deceased Dhanasa could not have been in a sound disposing state of mind even were the will really made and signed by him. The executors appealed to the High Court, and the appeal was disposed of by Scott, C. J. and Batchelor, J. The appeal was dismissed and probate refused. No definite issue was raised, it very rarely is in appeal to this Court, but it cannot be seriously denied that the appellate Court held that the evidence proved that the alleged testator was not, at the time the alleged will was executed, of a sound disposing mind. This is as clear as though the learned Judges had raised the issue in so many words and answered it in the negative and against the executors. It is necessary to emphasize these points in the statement of facts to clear the way of a certain amount of irrelevant and unte-

nable argument which might otherwise obscure the questions we propose to ask a Full Bench.

The widow Sitabai having come of age has now brought the present suit against the defendants as executors *de son tort*. They have again set up the will and claim to be invested under it with all the legal character of executors.

Two questions then arise :

1. Whether S. 41, Evidence Act is not applicable to the judgment of the Appellate Court and upon a right construction of its terms does not make that judgment conclusive against the present defence of the executors? It is admitted that had the judgment been in favour of the will it would have fulfilled all the requirements of S. 41 and conclusively established the legal character of the present defendants. But it is contended that a judgment of a Probate Court refusing probate does not, having special regard to the language of S. 59, Probate Act, either take away any legal character of the defeated petitioners, or have the like conclusive effect against, which it would admittedly have had for, them.

2. Whether the finding of fact of the appellate Court that the testator was not of sound disposing mind when the alleged will was made, is not *res judicata* between the same parties in the present litigation?

The need of reference to a Full Bench arises out of the decision of Farran, C.J., and Parsons, J., in *Ganesh Jagannath v. Ramchandra* (1).

We might, we think, have distinguished that case for the purposes of the second question without much difficulty. But it appears to have been extended since in this High Court by judgments which purport to follow it. One of these is an unreported decision of Chandavarkar and Heaton, JJ., in Suit Appeal No. 261 of 1910 which was cited in argument. It appears from the record that although the finding of the probate Court was against the "genuineness" of the will the learned Judges of appeal found no difficulty, basing their decision on *Ganesh Jagannath Dev v. Ramchandra* (1) in holding that in a subsequent suit between the same parties the same question of fact might be raised and determined. We are unable to distinguish that case from the case before

(1) [1897] 21 Bom. 563.

us. If it be a legitimate extension of *Ganesh's* case (1) then we find ourselves unable to agree with that decision either.

Both questions are of great general importance. Differences of opinion are likely to arise in answering either, and we have therefore thought this a suitable opportunity to invite an authoritative and final answer to both.

In my opinion the judgment of a probate Court refusing probate is as much within the scope and intention of S. 41 as a judgment granting probate. The distinctions sought to be drawn, though lying on the surface and easily made intelligible and plausible, will not, I submit, bear critical examination. I believe the true rule to be this: in any probate proceeding prosecuted to final judgment that judgment, whether for or against the will, is a judgment in rem and, if against the will, takes away the legal characters of all those claiming to be executors and legatees under it, as conclusively as a judgment for the will confers such character upon them; and I further believe that that rule is universal and subject to no exception. Dismissals of petitions for probate for default may be distinguished and for the purposes of this reference neglected. The reasoning which appears to underlie that part of the decision in *Ganesh Jagannath v. Ramchandra* (1) and has been strongly pressed, with further elaborations, upon us by the Hon'ble and learned Advocate-General is this: Hindu wills in the mufassil unless disposing of property in the town and island of Bombay are not governed by the Succession Act or the Hindu Wills Act. Executors of such wills derive their rights direct from S. 4, Probate Act, and are under no obligation to apply for probate. S. 187, Succession Act, has no applicability to them. If in the exercise of a mere option they do apply for probate and it is refused the judgment even going the length of declaring that the testator was insane when the alleged will was made, or that the alleged will was a forgery, they may still continue to act under this alleged will in the mufassil and set it up in any suit as though the judgment of the probate Court had never been pronounced.

This appears to me, with all becoming deference, to be utterly fallacious.

The fact that the executors of such wills need not obtain probate to meet the requirements of S. 187, Succession Act, ceases to have any bearing or even relevance upon or to cases in which they have availed themselves of their option and deliberately invited the judgment of the probate Court. Once having done that, once the judgment has been given, it is there, a fact which has to be reckoned with and to which all the legal force and effect with which it is legislatively invested under S. 41, Evidence Act, must be given. The degree and extent of that force and effect must be determined solely with reference to S. 41 and to the fact of the judgment, entirely irrespective of any such side consideration as that if the executors had not voluntarily invoked it, it never might have been given, never would have been a fact.

The learned Judges who decided *Ganesh Jagannath v. Ramchandra* (1) appear to have made this one of the main, if not the main, ground of their conclusion, that in all such cases refusal to grant probate, which is in effect an affirmative finding against the will, no matter how worded or how arrived at (as I hope to show presently), has not the conclusive effect given to all such judgments which "confer or take away," etc., certain legal characters under S. 41. With all proper respect I am unable to agree in that conclusion. Logically it might be extended to every case of litigation, if the ground of reason be confined to the option of the plaintiff to sue or not to sue. For no plaintiff is legally compelled to sue. But when a plaintiff does sue and invites the adjudication of the Court, the adjudication and its result is binding upon him. It may be urged that this is not quite a fair representation of the real argument. What is meant is that executors and legatees governed by the Succession Act must sue, if they are to obtain any benefit under the will in the character of the executor or legatee (S. 187), while executors who are not governed by the Act are under no such compulsion. That is perfectly true, but it does not affect, in my opinion, in the slightest degree the validity of the argument, that once having chosen to ask for probate they must be as bound, as any other persons who have asked

for the same judicial aid, by the judgment whether for or against them. It is surely a *reductio ad absurdum* to contend that executors, not governed by the Succession Act, may come in and invite the judgment of the probate Court upon a will, and, when that judgment positively declares upon evidence that the will propounded is a forgery, may go back to the *mofussil* and continue to act as executors under it. Even the Advocate-General shrank from pushing his argument that length. Yet that length it must go if sound at all. For no true logical distinction can ever be drawn between the particular grounds upon which probate is refused.

In every case without exception there is one question and one only for the Court to answer, will or no will? If it finds that there is a will (by which, of course, I mean a will legal and valid in all respects) it must grant probate. It can only refuse probate on the ground that in law there is no will, and the refusal is logically tantamount to the affirmative proposition, founded upon evidence, that there is no will. So that, in my opinion, it does not make the slightest difference whether probate be refused for failure to comply with the requirements of S. 50, Succession Act or because the Probate Court held that the will was a forgery, or the testator of unsound mind when it was made. (I may point out, merely as a curiosity of law, that in the particular case with which Farran and Parsons, JJ., were dealing, probate was refused for failure to have complied with the requirements of S. 50, Succession Act, while, so far as I can gather from the fact, that section had no applicability at all to the case.) But I am now entering upon another line of reasoning which does not properly belong to the ground that if an executor has an option to apply for probate or not, and does apply, the resultant judgment is on a different legal footing, has different legal consequences, from a like judgment given on the application of a person who is (virtually) compelled to obtain probate under S. 187.

To say that in the former case the executor is in no worse position after asking and obtaining the final decision of a competent Court against the will, appears to me to be logically untenable, to be radically unsound, regarded either

theoretically or practically, and surely to involve absurd consequences.

It is next contended that since S. 59, Probate Act, expressly confers finality and conclusiveness upon a judgment in favour of the will, while the Act is silent as to the effect of judgments against a will, there is a plain and designed legislative distinction. The latter cannot be regarded as having the same legal effect as the former. The answer to this is short and decisive. What is wanting in the Probate Act is supplied in S. 41, Evidence Act. As to that it is urged that the section, when it speaks of a judgment "taking away" any legal character, means doing so expressly as upon a revocation. I think that that is much too limited and technical a construction. In construing and applying the section we surely must look at what has actually been done. Holding that a will is a forgery for example is, to all intents and purposes, as express a taking away of all rights rooted in it, as a declaration, that the will is genuine and, therefore, entitled to probate, is an express conferring of such rights. In reason there is no distinction, nor can one be suggested if extreme cases like this are put. It is only in cases where the ground of refusal is less definite, confined, let us say to formalities of execution, rather than to inherent turpitude that any room can be found for such arguments. But here again it is easy to trace and expose their radical fallacy. For I repeat, and without much fear of contradiction, that rightly analyzed what every probate Court has to decide is one thing and one thing only: will or no will? A will is just as much not a will in the eye of the law, if essential formalities have not been complied with, as though it be found affirmatively to have been a forgery. So that the refusal to grant probate implies the affirmative finding on the evidence: no will. And that being found it follows that the Court by declaring that there is no will takes away all legal characters which are referable exclusively to the will.

Pushed to its logical conclusion the principle contended for by the defendants would warrant executors, not governed by the Succession Act, inviting the judgment of the probate Court on the same will year after year, thus

offending against the universal principle of *res judicata*. And for all reason to the contrary I do not see why all executors should not be in the same case, that is to say, at liberty to try and try again, no matter how often the probate Court had pronounced against the will. Why should one judgment affirming a will be final and conclusive against all the world, while a hundred judgments against a will should have seemingly no legal effect whatever? The contention that judgments refusing probate do not take away any legal character from petitioning executors and legatees could hardly be used generally; in the exceptional case with which we are dealing, the contention, namely where the executors are not under the disabilities of S. 187 and, therefore, need not take out probate at all unless they desire to get in debts, is shown, I hope, to rest upon reasoning equally unsound and untenable. Indeed looked at merely as a logical argument there is much more to be said for executors bound by S. 187 than for those who are not. In the latter case the argument is that since they have rights as executors independently of probate, refusal to grant them probate cannot take away such rights.

But that is exactly what it does. It would be a much more ingenious, and for the mere purposes of dialectic a much sounder, argument to say that executors and legatees bound by S. 187 have no rights at all under the will until probate has been granted, therefore, refusal to grant probate does not take away any of their rights or characters under the will, because they never had any, which (as is the other argument but more so) is absurd. In my opinion where the question will or no will is submitted to the decision of a Probate Court, tried out and finally determined by that Court, its judgment either way is conclusive, within the meaning of S. 41, Evidence Act. This too, in my opinion, is by far the most important of the two questions we are submitting to the Full Bench. For if my view be adopted we shall have a clear rule of universal applicability about which there will be no room for further argument or uncertainty, the most fruitful sources of litigation, whereas if in all such cases, I mean

where probate has been refused, the judgment is not within the scope of S. 41, the parties relying on it have to fall back upon the general principle of *res judicata*, matters of difficulty and uncertainty are likely often to arise.

If, for example, in the present case the judgment of the High Court on the probate petition of the executors be held to be final and conclusive against them under S. 41 (as with respect I submit it ought to be) there is an end of the matter. There is no will, there are no executors, no legatees, and the present defence is not available to the defendants.

The point has recently been considered by a Division Bench of the Calcutta High Court (Mookerjee and Carnduff, JJ.), in *Ramani Debi v. Kumad Bandhu Mookerjee* (2). I do not consider it necessary to examine cases in detail, where the point is, as it is here, one of simple construction and correct reasoning only. But while the tenor of Mookerjee, J.'s judgment will be found, I think, strongly to support my view which also has the support of American Courts, all these judicial pronouncements seem to me to fall a little short of complete accuracy. Looking to such authorities it is fair to represent them as agreeing generally that judgments refusing probate, on the merits, are as much judgments in rem as judgments granting probate. But this will always leave room for a certain amount of foggy thought and argument. After all what are these judgments in rem but a part of the law of *res judicata*. Just as every judgment inter partes upon the same materials is *res judicata* between them and their representatives, so in a special class of cases the judgment is *res judicata* not only inter partes but extra partes contra mundum. Even so the judgments in rem are no more than *res judicata*. And we thus arrive at once at a simple general principle which will do away with all need to argue about particular exceptions on any other ground. It is this: In every case where the judgment is in rem, if it would have been *res judicata* inter partes, it is also *res judicata* against all the world. That disposes of all such cases as Mookerjee, J. was considering, and dispenses with the need of arguing them. What would not

(2) [1910] 7 I. C. 126.

be res judicata inter partes (e. g., dismissal for want of prosecution) cannot be res judicata against anybody. And this brings me back to the general rule. I began by stating that where probate proceedings have been prosecuted to judgment (in other words where that judgment would upon the facts and contentions before the Court be res judicata inter partes), it must always be res judicata contra mundum. But until some clear view is thus obtained of the fundamental principles underlying any part of the law, its practical administration is almost sure to be complicated by drawing distinctions upon particular cases, most of which in the argument here can easily, I think, be shown to be no true distinctions at all.

I will now deal with the second question referred to the Full Bench. Since I would use the judgment of the appellate Court in the probate proceedings under S. 41 against the defendants, it follows from the principles I have stated that I consider the finding of fact arrived at by their Lordships the Chief Justice and Batchelor, J., a res judicata and binding upon the present defendants. What their Lordships found (it is merely idle to dispute this because no definite issue was framed) was this that having regard to the medical evidence the testator Dhanasa was not of sound mind when the will was alleged to have been made. Therefore there was no will. If that be res judicata in the present case there is an end of the defence. Again, the defendants rely on *Ganesh v. Ramchandra* (1). But while the learned Judges did decide in that case that the finding of the Court against the will on the probate proceedings was not res judicata against the executors, in a subsequent suit they did not find that no finding of a probate Court could ever be res judicata. In the opinion of their Lordships there was no issue affecting the genuineness of the will either raised or tried, and therefore, no res judicata. With all respect I submit that that decision, even so restricted, is logically indefensible. The Court of appeal deciding the probate application held that to make the will a will legally, certain formalities prescribed in S. 50, Succession Act, were indispensable and had not been complied with. It is true that

S. 50, did not, as far as I can now ascertain, apply at all, but that has nothing to do with the principle of the judgment in *Ganesh v. Ramchandra* (1). If it had applied, then the finding of the appeal Court on the probate was in effect that its requirements had not been complied with, and that as a result there was no will. That I submit is in all respects as much a finding of fact as a finding that the will was a forgery. And, in my opinion, it ought to have been held res judicata in the subsequent suit. There can be little doubt, having regard to certain passages in the judgment, that had the finding been that the will was a forgery, or that the testator was insane when he made it, the learned Judges would have regarded that as res judicata. So that had the matter rested there we might have been content to distinguish that case and base our present judgment on that ground. But there is the later case decided by Chandavarkar and Heaton, JJ., in which apparently the finding of the probate Court was that the will was not genuine and yet their Lordships purporting to follow *Ganesh v. Ramchandra* (!) held that the finding was not res judicata in a subsequent suit. Now there could be no question at all apart from two verbal technicalities which I must advert to in a moment, but that this finding of fact would be (and undoubtedly is) res judicata inter partes. The Advocate-General contends that it is not because the probate proceedings are not a suit. S. 83 provides that wherever contentious, probate proceedings shall as far as possible take the form of a suit. All appeals from them come to the High Court on the appellate side in the form of regular ordinary first appeals from decrees. To all intents and purposes these proceedings are suits. But, of course, I must admit the verbal difficulty which I pointed out at once, that what is made to conform as nearly as possible to another thing is impliedly not that thing.

The second difficulty which I also pointed out arises out of the wording of S. 11. It may be argued that the Court deciding the fact sought to be made res judicata is not itself competent to try the subsequent suit. But let us look first at the reason of the

thing. Why is this part of the law of *res judicata* obviously to prevent matters of great importance being decided incidentally, as they often are, in Courts of inferior jurisdiction, so as afterwards to exclude those matters from the cognizance of the Courts of superior jurisdiction. That is the single reason for the rule. But it has no more than a verbal application to such a case as this. Here the District Judge, who first decided the question of fact, was himself competent to try the subsequent suit, in which that question of fact would arise; and a fortiori their Lordships who heard the appeal were competent, and no higher tribunal in this country could be found for the trial of the issue. In my opinion the objection has no real substance, though it lends itself to a great deal of technical argument. The District Judge, remains the District Judge when exercising his probate jurisdiction; there is no separate Court. Similarly the Judges of this High Court are sitting in the exercise of their appellate jurisdiction as much to deal with these as with any other first appeals.

As to the first objection it is met by the judgment of Privy Council in *Ram Kirpal Shukul v. Mt. Rup Kuari* (3). True, in that case the *res judicata* arose out of an execution proceeding which is normally part of a suit; but that was not the ground upon which the judgment proceeded. Broadly that ground was that S. 11 does not contain the whole law of *res judicata*, which is general and of universal application. In other words, that in a proper case, Courts would be perfectly justified in neglecting the actual words of S. 11, if the substance showed that the section ought to be applied. And that is certainly the case here. I mean, if there is any real difficulty in the words, I do not agree that there is, for I think that mere quibbling apart, these contentious probate proceedings are in effect suits. However that may be, I am emphatically of opinion that the substance and reason of the matter before us makes it as clear a case of *res judicata* as ever could be. Here is a simple question of fact offered for trial by the present defendants to the District Judge and found against them. They take it up

(3) [1884] 6 All. 269 (P. C.).

on appeal to the High Court and again the finding is against them. Are they to be allowed now to ask a second District Judge, it may be, and a second Bench of this High Court to try the identical question of fact between the same parties on virtually the same materials? Surely not. In this suit the defendants have added three more witnesses, but that, in my opinion, does not make the slightest difference. The decisions of both the Courts in the probate rested solely on the medical evidence. That is as it was then and therefore there is really no new material before us affecting the ground of the previous judgments. But even if there were I should still remain of the opinion that no such evidence could be led, because no such issue could be raised again, no such question re-agitated. In my opinion however it is much more important to have the first question answered in the way I propose. For, if it be only on the ground of *res judicata* that the judgment of the probate Court bars the defendants, it would still be open to legatees to re-open the question upon exactly the same materials, and if there were a dozen legatees and a dozen executors I see no reason in principle why there should not be two dozen suits all hinging upon the identical question of fact, namely whether or not there ever was a will.

I cannot bring myself to believe that such a result could be in the contemplation of the legislature, or that it would be consistent with the administration of this branch of the law upon sound general principles.

In my opinion then the judgment of this appeal Court on the probate, holding that the testator was not of sound disposing mind, is relevant and conclusive against the present defendants under S. 41.

I am also of opinion that even if this be not so the finding of fact arrived at by the learned Judge of appeal in the probate suit, (I call it so intentionally) is *res judicata inter partes* in the present suit. The parties are the same.

Macleod, J.—For the reasons given by my brother Beaman I am of opinion that the two questions which we think should be referred to the decision of a

Full Bench ought to be answered in the affirmative.

Opinion of the Full Bench.

Scott, C. J.—With regard to the first question referred we are of opinion that S. 41, Evidence Act, is not applicable to the judgment of the appellate Court. The finding of a Court that an attempted proof has failed is not a judgment such as is contemplated in that section. The only kind of negative judgment which is contemplated is that which expressly takes away from a person the legal character which has up to that time subsisted. That is not the case with the judgment in question here.

With regard to the second question we are of opinion that the judgment operates as *res judicata* between the parties. The contention was advanced on behalf of the appellants that the probate proceedings, in which the previous judgment was pronounced, were not a suit within the meaning of S. 11, Civil P. C.; but S. 83, Probate and Administration Act provides for the form which contentious probate proceedings shall take. They must take the form as nearly as may be of a suit according to the provisions of the Civil Procedure Code, in which the petitioner for Probate or Letters of Administration shall be the plaintiff, and the person who may have appeared to oppose the grant shall be the defendant. There is no definition of the word "suit" either in the Civil Procedure Code or in the General Clauses Act, and we are of opinion that as contentious probate proceedings must take the form of a suit, they constitute a suit within the meaning of S. 11, Civil P. C. The contention appears to be a novel one. It was not advanced, so far as we can gather from the reports, in the case of *Mirza Kurratulain Bahadur v. Nawab Nuzhat-ud-Dowla Abbas Hossein Khan* (4) nor has it, so far as we know, ever been advanced before in this Court.

G.P./R.K. Answered in affirmative.

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BEAMAN AND MACLEOD, JJ.

Behram Rashid Irani—Defendant—Appellant.

v.

Sorabji Rustomji Elavia—Plaintiff—Respondent.

Second Appeal No. 236 of 1912, Decided on 3rd October 1913, from decision of Dist. Judge, Nasik, in Appeal No. 98 of 1911.

(a) Transfer of Property Act (4 of 1882), S. 59—Facts to be proved in equitable mortgage stated.

An equitable mortgage under S. 59, T. P. Act, needs three facts to be proved: (1) a debt, (2) deposit of title deeds and (3) an intention that the latter should be security for the former.

[P 16 C 1]

(b) Transfer of Property Act (4 of 1882), S. 59—Writing is not necessary to create equitable mortgage.

No writing is necessary to create an equitable mortgage. It is of the very essence of such mortgage that it comes into being without any writing by mere conjunction of certain facts.

[P 16 C 2]

(c) Transfer of Property Act (4 of 1882), S. 59—Intention that deposit of title-deeds is security for debts must be clearly proved.

The intention must be clearly proved as a question of fact. Where to prove such intention the mortgagee offered as evidence a contemporaneous written agreement whereby: (1) the mortgagor acknowledged the equitable mortgage, (2) agreed to the property being a further security for the loan and (3) also agreed to execute upon demand a proper legal mortgage of the property covered by the title-deeds deposited.

Held: that as the agreement created a charge on the property for more than Rs. 100 it was compulsorily registrable, and that not being registered it was inadmissible in evidence and consequently there was no evidence of intention to connect the deposit of title-deeds with the loan.

[P 16 C 1, 2]

(d) Transfer of Property Act (4 of 1882), S. 59—Subsequent contemporaneous loan is insufficient to warrant presumption that contemporaneous or antecedent deposit of title-deeds is security for loan.

That the mere fact that there was a subsequent or contemporaneous loan is insufficient in law to warrant a presumption, apart from any other evidence, that the contemporaneous antecedent deposit of title-deeds was necessarily made as a security for the loan.

[P 16 C 1, 2; P 17 C 1]

(e) Transfer of Property Act (4 of 1882), S. 59—Title deeds deposited in towns in S. 59—Mortgage is effective irrespective of situation of property.

Per *Macleod, J.*—*Beaman, J.*, dubitante—Where title-deeds are deposited in the towns mentioned in S. 59 an equitable mortgage is effected irrespective of the situation of the property to which the title-deeds refer.

[P 17 C 1]

P. B. Shingne—for Appellant.

K. N. Koyajee—for Respondent.

Beaman, J.—In February 1907 the defendant deposited title-deeds of certain property in the Zilla of Nasik with the plaintiff. The plaintiff advanced to the defendants a sum of money and the present suit has been brought upon the footing of the said deposit which was made in the City of Bombay being an equitable mortgage of the Nasik property. I doubt much whether the legislature ever intended to extend the doctrine of equitable mortgage by mere deposit of deeds in Bombay to lands lying anywhere outside Bombay. But as the section is worded I will not press that doubt here. Now an equitable mortgage under S. 59, T. P. Act, needs three facts to be proved: (1) a debt, (2) deposit of title-deeds and (3) an intention that the latter should be security for the former. I have often had to notice in these Courts the growth of the doctrine of equitable mortgage which was very summarily introduced by three judgments of Lord Thurlow given in rapid succession. The doctrine thus created amounted at that time to very much what the law now is, as I have just expressed it, although the learned Chancellor, I think, leant strongly to the supposed legal presumption arising from the fact of indebtedness and the contemporaneous or subsequent deposit of title-deeds. Then, for the better part of a century, the Courts in England virtually adopted this presumption as a presumption of law and the need of proving intention almost disappeared. Latterly however the legal direction in England veered in the opposite doctrine and the Courts began to insist more and more strongly upon the proof of intention as a question of fact, and that has been embodied in our own statute law and that is the law we have to administer.

Now the difficulty in the present case arises out of the manner in which the plaintiff has sought to discharge the burden of proof upon this question of fact. He has offered in evidence a contemporaneous writing or agreement which does, no doubt, fully set forth the very clear intention of the defendant that the deposit of the title-deeds should be a security for the loan to be advanced on or before the signature of that agreement, and the paper goes on to

bind the defendant to execute upon demand a proper legal mortgage of the property covered by the title-deeds deposited. It appears to me that, having regard to the opening part of that document, it does in itself create a charge upon the property and viewed in that light is compulsorily registrable. I am not disposed here to go into the very nice questions which arise and have often been discussed in this and the other High Courts upon contemporaneous writings of this kind, the question being usually whether these writings do in themselves create a mortgage or are merely subsequent records of it or anticipatory statements leading up to it. But I may observe, speaking generally, that no equitable mortgage is ever "created" by a writing. It is of the very essence of the equitable mortgage that it comes into being without any writing by the mere conjunction of certain facts.

The inclination of my own mind has always been very strongly against any conclusion which implies that an equitable mortgage needs any such contemporaneous writing for its complete legal effect and consequences, and I think, rightly and logically viewed, this writing can never be put higher than proof of the intention of parties. Where it is limited to an agreement to execute a legal mortgage, if called upon to do so, I should doubt myself whether it would ever be compulsorily registrable. But as I say that question is one of much nicety and opinions have differed widely upon it. I do not consider it necessary to go further into it here because, in my opinion, this agreement requires registration in itself, because it creates, very clearly creates, a charge upon the property to the extent of more than Rs. 100, and that being so it is compulsorily registrable and cannot be received in evidence of any transaction relating to or affecting that immovable property. Now, if this document be excluded on this ground, as I think it must be, there remains no evidence whatever of intention to connect the deposit of title-deeds with the loan borrowed by the defendant from the plaintiff, and the mere fact that there was a subsequent or contemporaneous loan is not now, in my opinion, sufficient in law to warrant a presumption, apart from

any other evidence, that the contemporaneous or antecedent deposit of title-deeds was necessarily made as security for the loan. That is to say, on the question of fact there is absolutely no evidence, apart from this writing, which cannot be admitted to discharge the onus of proof which lies upon the plaintiff, and that is the ground to which I would prefer to restrict myself in reversing the decree of the lower appellate Court, restoring the decree of the Court of first instance and dismissing the plaintiffs' suit with all costs.

Macleod, J.—I agree with my brother Beaman that this appeal must be allowed, and that the decree of the lower Court dismissing the suit must be restored, the plaintiff paying the costs throughout. It has been held by the High Courts of Calcutta and Allahabad that in the case of deposit of title-deeds actually made in the towns mentioned in S. 59 the mortgage can be effected irrespective of the situation of the property to which the title-deeds refer. I do not think there is anything in the contention that in the case of an equitable mortgage the property in the mufassil cannot be affected by a deposit of title-deeds in Bombay. In this case it appears to me that the plaintiff, in order to prove his mortgage must rely on the document of 9th February 1907. That is the only evidence of the contract, and, as it requires registration, a contract of mortgage cannot be proved. Plaintiff therefore must fail.

G.P./R.K.

Decree reversed.

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MACLEOD, J.

Mangaldas N. Motivalla and another
—Plaintiffs.

v.

Abdul Razak Haji Sulaiman—Defendants.

Civil Suit No. 240 of 1913, Decided on 3rd February 1914.

(a) **Hindu Law—Succession**—In matter of succession and inheritance Khojas and certain members are governed by Hindu law as applied to separate property.

The invariable and general presumption in the case of Mahomedans is that they are governed by the Mahomedan law and usage and it lies on a party setting up a custom in derogation of that law to prove it strictly. In matters of succession and inheritance however the Khojas and Memons are governed by the Hindu

law as applied to separate and self-acquired property. [P 18 C 2]

(b) **Hindu Law — Applicability — Law of joint family property is inapplicable to Cutchi Memons.**

Under the Hindu law there is no such thing as succession and inheritance to joint family property and as such the law of joint family property is not applicable to Cutchi Memons.

[P 20 C 1]

Therefore a son of a Cutchi Memon does not acquire by birth an interest in property inherited by his father by the law of inheritance and succession.

[P 21 C 1]

Raikes, Strangman and Inverarity—for Plaintiffs.

Setalvad and Jinnah—for Defendants.

Judgment. — Plaintiff 1 obtained decrees for large amounts in two suits, Nos. 404 of 1911 and 707 of 1912, filed against one Abdul Razak Haji Sulaiman. Plaintiff 2 obtained a decree against the same person in Suit No. 719 of 1912. Warrants for the arrest of Abdul Razak were issued in execution of the said decrees, and on 4th January 1913 he was arrested by the Sheriff's bailiff. It is alleged that Abdul Razak then proposed that he would execute a legal first mortgage of all his share, right, title and interest in the ancestral properties belonging to the joint Cutchi Memon family of which he was a member as a condition for the plaintiffs agreeing to release him from arrest.

Accordingly Abdul Razak signed an agreement undertaking to execute such a legal mortgage. On 9th January a draft mortgage was sent to Abdul Razak for approval, but Abdul Razak then alleged that he signed the agreement under threats, coercion, undue influence and pressure while he was under the influence of liquor.

The plaintiffs thereupon filed this suit on 10th March against Abdul Razak praying for specific performance of the agreement of 4th January.

Thereafter Abdul Razak filed his petition in insolvency and the Official Assignee was added as 2nd defendant on 5th July 1913. When the plaint was amended no relief was asked for against him.

Defendant 1 filed his written statement on 8th September 1913. He denied that he had any share or interest in any ancestral properties which was at present capable of being transferred by way of mortgage, sale, or otherwise. He contended that the two writings

signed by him on 4th January were not binding on him as he was made to execute them by coercion, fraud and undue influence.

Defendant 2 filed his written statement on 18th September. He did not admit that defendant 1 had a share in certain ancestral properties as alleged. In the alternative he contended that if defendant 1 had a share the agreement signed by him was not binding either on 1st defendant or on himself. I allowed the plaintiff to amend the plaint so as to claim relief against defendant 2 also.

The first issue raised was :

Whether defendant 1 had any present interest in the properties referred to in para. 1 of the plaint capable of being transferred.

I determined to take evidence and hear arguments on this issue in order to decide it before going on to the further issue:

Whether the agreement was binding on defendant 1 and whether specific performance could be decreed.

One Ebrahim, a Cutchi Memon, died many years ago leaving four sons, Ludha, Abdul Wahed, Osman and Noor Mahomed. They started the business of Ludha Ebrahim & Co. in partnership. Ludha and Osman died without issue. Abdul Wahed had seven sons of whom Sulaiman was the eldest. Noor Mahomed had two sons, Essac and Oomer, and a daughter. Oomer had two sons Abdul Sattar and Dawood.

In 1909 Abdul Sattar, then the only surviving male member of Noor Mahomed's branch, filed a suit, No. 86 of 1909, against the members of the branch of Abdul Wahed seeking for partition of what was called the "joint family property." On 13th April 1909, a consent decree was passed in that suit whereby it was decreed that the plaintiff should take the properties moveable and immovable described in Sch. A to the decree in full satisfaction of his share in the joint family property and business, the decree to operate as a partition of the joint family property and business between the plaintiff and the defendants.

At that time Sulaiman had four sons and one daughter, all minors, the eldest son being Abdul Razak, the present defendant 1.

(Pedigree table see p. 19)

The proposition laid down by Mr. In-

verarity for the plaintiffs was as follows :

The son of a Cutchi Memon takes a vested interest by birth in ancestral property in the hands of his father.

He relies for that proposition on decisions of this Court to the effect that Cutchi Memons in all matters of inheritance and succession are governed by Hindu law.

These decisions have recently been exhaustively reviewed by Beaman, J., in *Jan Mahomed v. Datu Jaffar* (1). The parties to that suit were Khojas, but it seems to be generally considered that all decisions on this vexed question relating to Khojas are equally applicable to Cutchi Memons and vice versa.

I entirely agree with the conclusions arrived at by Beaman, J., that :

"Where Mahomedans are concerned, the invariable and general presumption is that they are governed by the Mahomedan law and usage. It lies on a party setting up a custom in derogation of that law to prove it strictly. But in matters of simple succession and inheritance it is to be taken as established that succession and inheritance among Khojas and Memons are governed by the Hindu law as applied to separate and self-acquired property."

Westropp, C. J., in *In re Haji Ismail Haji Abdulla* (2) said :

"We know of no difference between Cutchi Memons and any other Mahomedans, except that in one point connected with succession it was proved to Sir E. Perry's satisfaction that they observed a Hindu usage which is not in accordance with Mahomedan law. . . Under these circumstances we must hold them to be Mahomedans to whom Mahomedan law is to be applied, except when an ancient and invariable special custom to the contrary is established."

That decision was given in 1880 and I think I am right in saying that up to this day no other Hindu custom or usage has been proved by evidence as having been invariably observed by Cutchi Memons from ancient time, and it seems indisputable that, without such proof, it is not within the power of this Court, to impose upon any sect of Mahomedans a Hindu usage or a rule of Hindu Law. There is little doubt that the legal profession is firmly convinced that Khojas and Cutchi Memons are to all intents and purposes Hindus, governed by the Hindu law of the joint family, of will, of inheritance and succession. But the foundation for that conviction rests on a few obiter dicta in reported cases

(1) [1914] 22 I.C. 195.

(2) [1881-82] 6 Bom. 452.

which, as Beaman, J., has shown do not rest on evidence or on any logical basis.

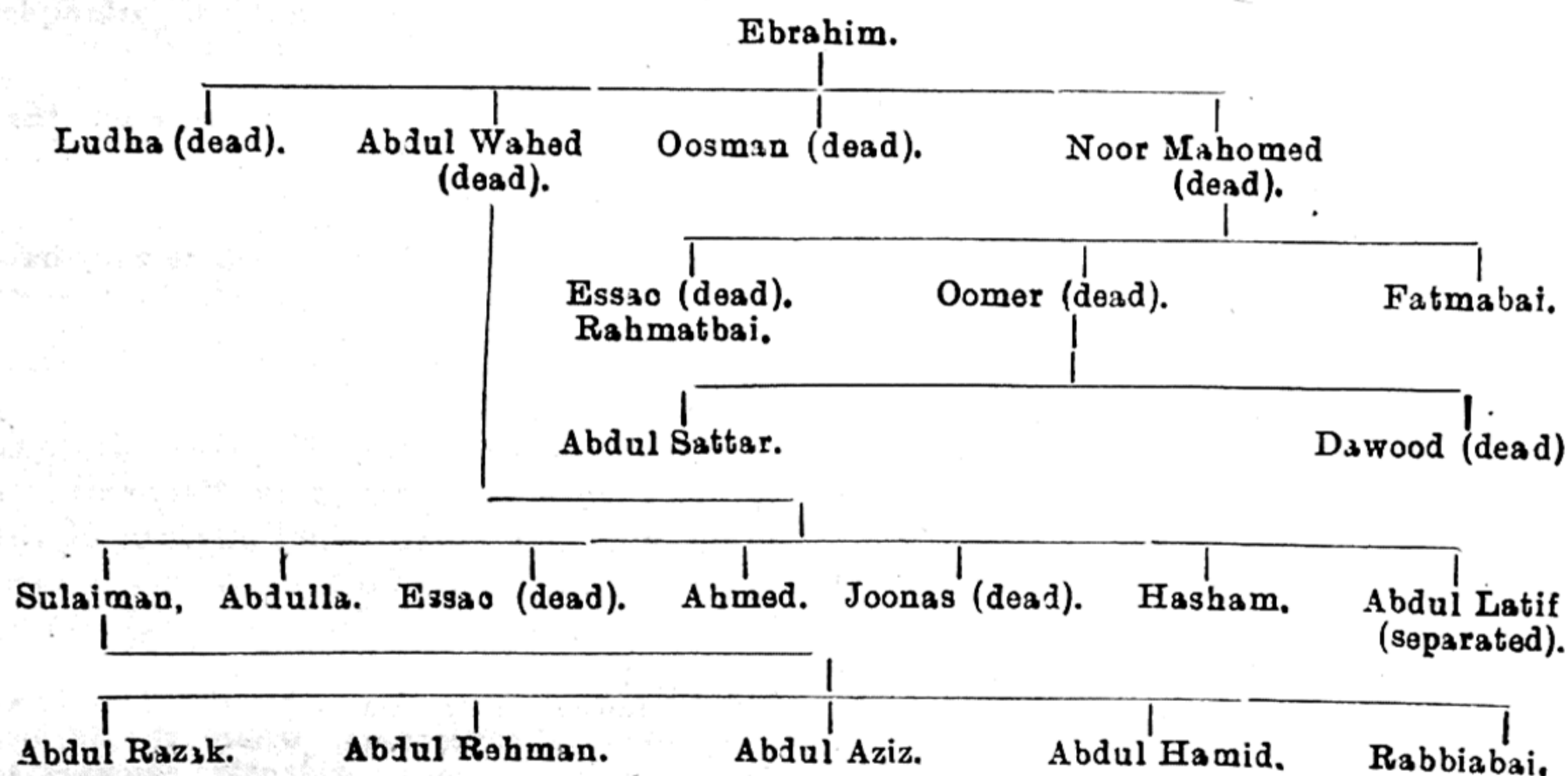
If a Cutchi Memon dies intestate leaving sons and daughters, only his sons take shares in his estate, the daughters being entitled to maintenance instead of to a share as under Mahomedan law. Starting with that simple undisputed proposition I am asked to hold that the sons would take as joint tenants as if they were Hindus, that the property in their hands would be ancestral, and that their sons would acquire from birth an interest in such ancestral property.

The argument is as follows: It has been proved that there is a custom amongst Cutchi Memons that daughters are excluded from inheriting the estate of their father dying intestate. Accord-

birth an interest in property inherited by his father.

I am only now concerned with sons born after the inheritance has fallen in. It seems obvious that such sons under Hindu law acquire an interest in the inherited property not by the law of inheritance but by the law of the joint family. For the distinction between coparcenership and inheritance see *Francis Ghosal v. Gabir Ghosal* (3).

The law of inheritance and succession can only be applied to property which devolves on the death of the persons entitled to succeed under that law. There is no such thing under the Mitakshara as inheritance and succession to joint family property. Such property is held by the family as a whole until partition. Members of the family



ing to Hindu law daughters do not take a share in their father's estate, therefore Cutchi Memons are governed by Hindu law in all questions of inheritance and succession.

Accepting that for the moment as a sound conclusion, which in any event must be confined to intestate succession the argument proceeds. Hindu brothers inheriting their father's estate take as joint tenants. If they have sons those sons acquire an interest at the same time; if they are born afterwards they acquire an interest by birth. Therefore whether such an after-born son acquires an interest by birth in the joint family property is a question of inheritance. But Cutchi Memons are governed by Hindu law in questions of inheritance. Therefore a Cutchi Memon acquires by

pass away, new members are born; the property remains the property of those members of the family who are alive at any particular moment. It is only when property ceases to be joint that the necessity arises for rules of inheritance and succession.

In other words the rules of inheritance and succession under Hindu law apply only to separate or self-acquired property. The notions of joint family property, joint family business, are utterly unknown to Mahomedan law. To conclude, therefore, that because Cutchi Memons have retained the rules of Hindu law relating to inheritance and succession which can only be applied to separate property they have also retained the law of the joint family

with all its far-reaching consequences is absolutely illogical. In this case it is not suggested that Ebrahim left any property. His four sons are referred to in the plaint in Suit No. 86 of 1909, as the founders of the business of Ludha Ebrahim & Co. Nothing is said about their having inherited any property from Ebrahim. But if they had, it would not make any difference. They were therefore partners in that business in equal shares. The shares of the two sons who died without issue devolved on Abdul Wahed and Noor Mahomed or their issue, not by survivorship but by inheritance. To call the assets of the firm joint family property (see para. 2 of the plaint in Suit No. 86 of 1909) was begging the question. Strictly speaking the suit should have been a suit for the administration of the estates of Abdul Wahed and Noor Mahomed when the same result would have followed, one half of the assets going to Abdul Sattar and the other half to the sons of Abdul Wahed subject to the claims of females to maintenance and marriage expenses. Sulaiman and his brothers would then have held as tenants in common and there would have been no question whether their issue acquired an interest in the assets by birth.

In *Mahomed Sidick v. Haji Ahmed* (4) it was decided by Scott, J., that a Cutchi Memon had no power to dispose of ancestral family property by will. If I am correct in thinking that it has never been proved that Cutchi Memons have retained from ancient times the distinction recognized by Hindu law between ancestral and self-acquired property it must follow that the decision cannot be accepted as an authority. In that case it was argued by Mr. Inverarity, as it has been argued by Mr. Setalvad before me, that the rule of Hindu law whereby a son acquires an interest in the joint family property by birth is not a rule of inheritance and succession. I find from the original notes that the learned Judge has underlined his note of the argument which was taken down in extenso. I can find no answer to it, though I can sympathize with Mr. Inverarity, who failed to convince the learned Judge that that argument was sound. for finding the

Court against him now when trying to support that decision.

I have already declined to follow it in a recent case in which it was contended that Khojas were governed by the Hindu law of wills. I held that Khojas were in the matter of wills governed by Mahomedan law unless a custom to the contrary had been proved, and I pointed out that in all the cases then cited to me, which have now been so exhaustively analysed by Beaman, J., no trace could be found of the proof of any such custom.

I have been referred to passages in Broom's Legal Maxims, Edn. 7, on the judicial rule *stare decisis*. The learned author remarks at p. 119:

"Our common law system, as remarked by a learned Judge, consists in the applying to new combinations of circumstances those rules of law which we derive from legal principles and judicial precedents; and for the sake of attaining uniformity, consistency, and certainty, we must apply those rules, where they are not plainly unreasonable and inconvenient, to all cases which arise, and we are not at liberty to reject them, and to abandon all analogy to them, in those to which they have not yet been judicially applied, because we think that the rules are not as convenient and reasonable as we ourselves could have devised."

Those remarks were intended to apply to the decisions of English Judges, which were considered as determining what was the established custom of the realm, though in fact they made law. But at p. 121, I find the following passage:

"The judicial rule—*stare decisis*—does, however, admit of exceptions, where the former determination is most evidently contrary to reason. But, even in such cases, subsequent Judges do not pretend to make a new law, but to vindicate the old one from misrepresentation. For, if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was bad law, but that it was not law; that is, that it is not the established custom of the realm, as has been erroneously determined."

As there is no common law of India the decisions of Indian Judges do not determine what is the established custom of the country, but letting that pass and applying the above remarks as far as possible to the decisions of this Court on the question before me, which are by no means uniform, certain and consistent, I consider I am entitled to hold that as Mahomedans are governed by Mahomedan law, unless a custom to the contrary has been proved, if there be any previous decision of this Court

that Cutchi Memons are governed by the Hindu law of the joint family, it is manifestly contrary to reason if it depends, not upon evidence that there is such a custom, but upon the argument that the Hindu law of inheritance and succession includes the law of the joint family.

I am all the more fortified in coming to this conclusion considering the peculiar facts of this case. It is not the case of a Cutchi Memon setting up an ancient custom that Cutchi Memons on their conversion from Hinduism many centuries ago retained the Hindu law of inheritance and succession and consequently the Hindu law of the joint family. Here I have a Hindu and a Parsi who, having obtained decrees against a Cutchi Memon, extract from him as a condition for his release from arrest in execution of those decrees an agreement to mortgage the interest he was supposed to have acquired by birth in properties alleged to be joint family properties in the sense in which that term is used amongst Hindus. He now denies he has any such interest.

It may be that in recent years Cutchi Memons have been forced by the above-mentioned decisions and by the opinions of their legal advisers to believe that they are subject to the Hindu law of the joint family, but even if they have in consequence come to recognize the distinction according to that law between ancestral and self-acquired property, they are still entitled to ask this Court to hold that they are governed by Mahomedan law. In this case the plaintiffs rely entirely on the argument that a Cutchi Memon son acquires by birth an interest in property inherited by his father, by the law of inheritance and succession. This argument, in my opinion, will not bear analysis and is manifestly unsound.

The result is that the suit on this finding must be dismissed with costs.

G.P./R.K.

Suit dismissed.

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HEATON AND SHAH, JJ.

Umed Raja and another—Accused—Applicants.

v.

Emperor—Opposite Party.

Criminal Revn. Appln. No. 1 of 1914,
Decided on 20th February 1914.

(a) Criminal Trial — District Magistrate has no authority to order witnesses in proceedings before Subordinate Magistrate to be made co-accused.

During the course of a trial, accused asked the Magistrate to make two witnesses, who had given evidence in the case, co-accused persons with them. The Magistrate declined to do so. On appeal to the District Magistrate, he ordered that if the case was sent up by the police they should be directed to send up a complaint against the witnesses, and if it was taken up on complaint, the Magistrate should cause a complaint to be laid against the witnesses, preferably by the present complainant, and, if he refused by any clerk.

Held: that the District Magistrate had no authority whatever under the provisions of the Criminal Procedure Code, to make the order. [P 22 C 1]

(b) Criminal Trial — Witnesses in proceedings should not ordinarily be prosecuted before close of those proceedings.

On general principles, unless there be something very unusual, a Magistrate trying a case should be left to try it in his own way, and should not be interfered with during the course of the trial. If it transpires in the course of the case that criminal proceedings ought to be taken against anyone who has given evidence, those proceedings ought ordinarily to await the conclusion of the case, and certainly they ought to be instituted ordinarily by the order of, or on application to, the Magistrate who had tried the case and who is conversant with all the circumstances. [P 22 C 1]

G. S. Rao—for Applicants.

G. N. Thakore—for Opponent.

S. S. Patkar—for the Crown.

Heaton, J.—It appears that two accused persons, who have been tried by the Second Class Magistrate of Hansot, asked that Magistrate during the course of the trial to make two witnesses, who had given evidence in the case, into co-accused persons with them. The Magistrate declined to do so, whereupon they (the accused persons) appealed or applied to the District Magistrate.

To begin with, I do not know of any power given to a District Magistrate by the Code of the Criminal Procedure which would enable him to interfere in the matter (by way of appeal or revision). However, he did interfere and this is the order he made:

"If the case was sent up by the police (it does not seem that it was) they should be directed to send up a complaint against the two witnesses also."

I pause here, because I see no objection to this part of the order if it was made by the District Magistrate acting as a police officer. But I do see an objection to it if it was made by him as a Magistrate. The order then goes on:

"If it was taken up on complaint, the Magistrate should cause a complaint to be laid against the two witnesses, preferably by the present complainant, and, if he refuses, by any clerk."

This order, if it means anything, means that the Magistrate trying a case is directed by a superior Court, whatever his own view of the case may be, to make a complaint against a witness in the case he is trying or to order some clerk to do the same thing. I do not understand on what power conferred on him as a Magistrate the District Magistrate was then relying, nor do I understand the reasonableness of such an order. On general principles, unless there be something very unusual, a Magistrate trying a case should be left to try it in his own way, and should not be interfered with during the course of the trial. If it transpires in the course of the case that criminal proceedings ought to be taken against any who have given evidence, those proceedings ought ordinarily to await the conclusion of the case, and certainly they ought to be instituted ordinarily by the order of, or on application to, the Magistrate who has tried the case and who is conversant with all the circumstances. The order, which the District Magistrate has made, seems to me to offend against those principles. Moreover, it is, as I have already indicated, an order which he has no authority whatever to make under any provision of the Code of Criminal Procedure.

Therefore, I think, it should be set aside.

Shah, J.—I entirely concur.

G.P./R.K. *Rule made absolute.*

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SCOTT, C. J. AND DAVAR, J.

Surat City Municipality — Defendant
—Appellant.

v.

Chhabildas Dharamchand—Plaintiff—
Respondent.

Second Appeal No. 770 of 1912, Decided on 26th August 1914, from decision of Dist. Judge, Surat, in Appeal No. 57 of 1911.

Bombay District Municipal Act (1901), S. 82—Bill to recover arrears of house-tax served on person should state time of appeal to be preferred under S. 86 of Act—Issue of distress warrant on failure to pay arrears

is illegal—**Bombay District Municipal Act (1901), S. 86.**

A bill to recover the arrears of house-tax served upon a person by a Municipality does not fulfil the requirements of S. 82 (2) (b) (ii), District Municipalities Act, 1901, if it does not specify the time within which an appeal may be preferred under S. 86 of the Act, and in such a case the issue of a distress warrant on failure to pay the arrears is illegal inasmuch as the right of distress depends upon the observance of the statutory formalities, it being a right conferred only by the statute upon those conditions. [P 23 C 1]

Jarline and *S. S. Patkar*—for Appellant.

T. R. Desai—for Respondent.

Judgment.—This is an appeal by the Surat City Municipality against the decree of a District Judge, varying the decree of the first Court and holding that the plaintiff was entitled only to a sum of Rs. 23-13-0 in respect of moneys paid by him under protest to release certain property which was distrained by the Municipality in respect of arrears of taxes for a portion of the house in his possession. The money was recoverable by the plaintiff as having been paid under protest if he was able to show that the distress was not in accordance with law.

Now the power of the Municipality to levy distress upon the moveable property of a person from whom a tax is claimable depends upon the provisions of Chap. 8, District Municipal Act (Bom. Act 3 of 1901). It provides that :

"when any amount, which is claimable as an amount on any tax which is now imposed in any Municipal District, shall have become due, the Municipality shall, with the least practicable delay, cause to be presented to the person liable for the payment thereof, a bill for the sum claimed as due, and every such bill shall specify the period for which and the property in respect of which the sum is claimed, and shall also give notice of the liability incurred in default of payment, and of the time within which an appeal may be preferred as hereinafter provided against such claim; "

and Cl. (3), S. 82 provides that "if the sum for which any bill has been presented as aforesaid is not paid within fifteen days from the presentation thereof, the Municipality may cause to be served upon the person liable a notice of demand; "

and under S. 83 "if the person liable for payment does not, within fifteen days from the service of the notice of demand, pay or show cause why he should not pay or prefer an appeal, such sum may be levied under a warrant by distress. "

Therefore the notice of demand upon which the right of distress is based

depends upon the previous presentation of a bill complying with the statutory provisions set out in S. 82, Cl. (2).

It is not disputed that in this case the bill did not fulfil all the statutory requirements in that it did not state the time within which an appeal might be preferred under S. 86 of the Act. The procedure followed therefore was not a legal procedure. The whole right of distress depends upon the observance of the statutory formalities, it being a right conferred by the statute only upon those conditions. We therefore agree with the first Court in this respect, and without deciding the other questions which have been raised as to whether the amount of tax was claimable under the new Act of 1901, or whether any portion of the claim was barred by the law of limitation, we can dispose of the appeal upon the ground that the distress was illegal for the reasons above stated. We, therefore, hold that the decree appealed against was right. We have been asked to give relief to the respondent upon a cross-objection that certain costs in the way of proof of documents, which have been incurred, are not sufficiently covered by the order for costs in proportion to the sum awarded; but we have no materials which justify us in altering the order of the lower Court as to costs. We confirm the decree of the lower appellate Court and dismiss the appeal and the cross-objections respectively with costs.

G.P./R.K.

Decree confirmed.

*** A. I. R. 1914 Bombay 23**

HEATON AND SHAH, JJ.

Kaluram Pirchand—Plaintiff—Appellant.

v.

Gangaram Sakharamshet—Defendant—Respondent.

Second Appeal No. 297 of 1913, Decided on 2nd November 1913, from decision of 1st Cl. Sub Judge, Dhulia, in Appeal No. 404 of 1910.

(a) Civil P. C. (1908), S. 97—Right to appeal arises from preliminary decree—Suit for accounts—Preliminary finding directing accounts to be taken—There is no right of appeal.

The right to appeal under S. 97, Civil P. C., arises only when a preliminary decree is passed by a Court and there is no right of appeal when in a suit for accounts a preliminary finding

directing the accounts to be taken is recorded but no preliminary decree is drawn up.

[P 24 C 1]

* (b) Civil P. C. (1908), O. 20, R. 6—Duty of Court is to draw up decree in pursuance of judgment—No adverse inference as to right to appeal can be drawn against party omitting to ask Court to draw up decree.

There is no statutory provision requiring a party to ask a Court to draw up a decree in pursuance of a judgment and it is the duty of a Court to draw up a decree and the pleaders of the parties are to see that the decree is in accordance with the judgment. Therefore no inference adverse to a party as to his right to appeal can be drawn from an omission on his part to ask the Court to draw up a decree.

[P 25 C 1]

M. V. Bhat—for Appellant.

Shah, J.—The plaintiff brought the present suit for an account and for recovery of the balance due by the defendant, who was the owner of a ginning and pressing factory and with whom the plaintiff had dealings as a customer. Several issues relating to the agreement between the parties, custom of the trade, interest and other details, were raised by the trial Court. After recording findings on these issues the Court ordered accounts to be settled as per findings on 30th June 1910. It was also ordered on the same day that the plaintiff ought to apply for commission within four days from that date or put in his own statement of accounts, so that defendant may check it and ascertain its correctness. Ultimately a commissioner was appointed to take accounts. He took accounts and found that a certain sum was due by the plaintiff to the defendant. The Court accepted the commissioner's report and dismissed the plaintiff's suit with costs on 26th September 1910.

The plaintiff appealed to the District Court against the final decree and urged objections to the findings recorded by the trial Court, in accordance with which the account was taken between the parties. The lower appellate Court refused to allow the appellant to urge his objections, on the ground that the order dated 30th June 1910 amounted to a preliminary decree and that the plaintiff having failed to take steps to appeal against the preliminary decree, he must be deemed to have waived his right to appeal against the preliminary decree based upon these findings. The lower appellate Court accordingly confirmed the decree of the trial Court.

The present second appeal is preferred by the plaintiff against the decree of the lower appellate Court, and it is urged that the view taken by that Court as to the plaintiff's right to object to the findings in his appeal against the final decree is not correct. The defendant, though served, has not appeared. The learned pleader for the appellant however, has argued the case before us fairly.

After a careful consideration of the provisions of the Code of Civil Procedure and the decisions of this Court, I am of opinion that the appellant's contention ought to be allowed. In this case there was no preliminary decree drawn up in pursuance of the interlocutory judgment of 30th June 1910. The plaintiff took no steps to have the preliminary decree drawn up. Under the Code the right to appeal arises when there is a decree, i. e., when there is a formal expression of the adjudication. There is no right to appeal from any preliminary judgment of the kind we have here. The obligation to appeal against a preliminary decree by which a party is aggrieved, contemplated by S. 97 of the Code, arises when the right to appeal accrues and not before that. So far the point presents no difficulty and in the absence of any preliminary decree, it is clear that the party appealing against the final decree would have a right to object to findings which may have been recorded in the preliminary judgment.

It is said, however, that it is the duty of the party or his pleader to ask the Court to draw up a preliminary decree and that if he fails to do his duty the party must be deemed to have waived his right to appeal. The lower appellate Court has drawn that inference, but I am unable to accept it. Under the Code it is the duty of the Court to draw up a decree. The civil circulars also proceed upon this view of the provisions of the Code. There is no express provision of law which requires the party concerned to move the Court to draw up a decree. The only provision relating to the pleader's duty in this respect is to be found in Cl. 159 of the Manual of Civil Circulars (1912). This clause provides that :

"in cases in which pleaders are employed it is their duty to see that the decrees and final orders are properly drawn up in conformity

with the terms of judgment and every facility shall be given them for that purpose and for being heard in cases of doubt and difficulty."

So far as I know this provision has always been understood—and, in my opinion, rightly understood—as requiring the pleaders employed in a case to see that the decree is in accordance with the judgment when it is drawn up and before it is signed by the Court as required by the Code. It is not as if the decree is to be drawn up only when applied for as on the original side of this Court : see R. 245 of the Rules and Forms of the Bombay High Court, (1909). The practice in the mufassil Courts is in accordance with the provisions of the Code and the civil circulars, viz., that the Court is to draw up the decree, and that the pleaders, if any, in the case are to see that it is in accordance with the judgment. Thus it will appear that there is no provision requiring the party or his pleader to move the Court to draw up a decree. Under these conditions I am unable to say that a party waives his right to appeal, when he or his pleader omits to ask the Court to draw up a preliminary decree. Mere omission on his part to ask the Court to do that, which it is the duty of the Court to do of its own motion, cannot affect the right of the party to appeal, which can arise only when the decree is drawn up by the Court.

In this case there is no express waiver. And it can be implied when the person entitled to anything does or acquiesces in something else which is inconsistent with that to which he is entitled. The appellant in this case has done nothing which can be said to be inconsistent with that to which he is entitled, nor has he acquiesced in any such thing. His right to appeal did not arise as no preliminary decree was drawn up. The omission on his part to move the Court to draw up the preliminary decree is not inconsistent with his right to appeal when it arises.

The lower appellate Court has relied upon the case of *Govind Ramchandra v. Vithal Gopal* (1). Under similar circumstances a different view was taken of the duty of the party to apply to the Court to have a decree drawn up and of the inference of waiver to be drawn from the omission of the party to do

(1) [1912] 16 I. C. 159—36 Bom. 536.

that duty in the case of *Sakharam Vishram Surve v. Sadashiv Balshet Lodha* (2). I therefore feel myself free to decide this appeal in conformity with the conclusion which I have come to in this case. I have stated my reasons for holding that in the absence of any statutory provision requiring the party or his pleader to ask the Court to draw up a decree in pursuance of a judgment no inference adverse to the party as to his right to appeal ought to be drawn from an omission on his part to ask the Court to draw up the decree.

The result therefore is that the decree of the lower appellate Court is reversed, and the case remanded to that Court for disposal according to law. Costs of this appeal to abide the result.

Heaton, J.—I am of the same opinion.

G.P./R.K.

Case remanded.

(2) [1913] 19 I. C. 894=37 Bom. 480.

* A. I. R. 1914 Bombay 25

BEAMAN AND MACLEOD, JJ.

Laxman Ganesh—Plaintiff—Appellant.

v.

Mathurabai Narayan—Defendant—Respondent.

Second Appeal No. 531 of 1912, Decided on 22nd September 1913, from decision of Dist. Judge, Nasik, in Appeal No. 180 of 1911.

* Transfer of Property Act (4 of 1882), S. 101—One mortgagee holding two mortgages on same property—Property purchased by him in execution of decree on suit on first mortgage, subject to second mortgage—Second mortgage is extinguished.

Where a mortgagee, holding two different mortgages over the same property, sues on foot of the first mortgage, and on obtaining a decree purchases the property himself subject to his second mortgage, his second mortgage is extinguished and he becomes an absolute owner of the property. [P 26 C 1]

Gadgil and K. H. Kelkar—for Appellant.

D. R. Patwardhan—for Respondent.

Judgment.—The property in suit was first mortgaged by its owner to Govind and his two brothers in the year 1886. In 1894 the land was again mortgaged to Govind for Rs. 2,500. In the meantime it would appear that Govind's two brothers must have died, because in 1895 Govind brought a suit upon the mortgage of 1886 and obtained a decree. The mortgage amount claimed was Rs. 2,000. Govind obtained

permission to bid at the sale of the property, and also applied to the Court that that sale should be made subject to his own second mortgage of 1894. It appears that this application was at first rejected, but the sale certificate shows that the property was sold subject to Govind's second mortgage of Rs. 2,500, and was purchased by Govind himself for Rs. 1,791. Govind is the grandfather of the present minor plaintiff. Govind appears to have had two sons: Ganesh, the father of the plaintiff, and Narayan, whose widow is the defendant in this suit. Ganesh predeceased Govind. The defendant's husband survived Govind by a short time, both dying in the year 1904. Therefore the family appears to have consisted, before the death of Govind, of his son Narayan, and his grandson, the plaintiff. On the death of Govind the family consisted of Narayan and the plaintiff, and on the death of Narayan the ordinary result would have been that all the joint family property would have come into the sole and exclusive ownership of the minor plaintiff. But in 1905 it appears that a partition was sanctioned by the District Court of Nasik between the minor plaintiff and his aunt, the defendant, the latter taking in the proportion of 6/16ths. Speaking for myself I must record my surprise that any arrangement of that sort should have been come to and sanctioned by the District Court, since on the facts which have been stated on appeal it appears to me perfectly clear that the minor was entitled to the whole of the joint family property, whatever it may have been, and the defendant merely to maintenance.

Reverting to what happened in 1895, when Govind redeemed the first mortgage of 1886, it would appear that as a result of that sale and his purchase, the property, which was the subject-matter of that mortgage and his own subsequent mortgage of 1894, became his exclusive property, or that of the joint family of which he was a member.

It has been contended on behalf of the plaintiff that, having regard to the terms of the sale certificate, we are bound to hold that Govind kept alive the charge represented by his second mortgage of Rs. 2,500 upon this property

in his own interest within the language and intention of S. 101, T. P. Act.

Now, when the partition of 1905 was effected, a very curious procedure was adopted as apparently the officer entrusted with making lots put up all the documents which had the appearance of being valuable securities in sixteen packets, of which the defendant drew six and the plaintiff ten. Very unfortunately, I think, one of those lots contained the sale-certificate of 1895 and the other mortgage-deed of 1894. The former was drawn by the defendant, who has ever since been in actual possession of the property. The latter was drawn by the minor plaintiff who now seeks to enforce it against the defendant, as though the relations subsisting between them were the ordinary relations of mortgagor and mortgagee.

In our opinion it is clear that, after what has occurred in 1895, Govind could have had no right to sue himself in a double capacity as mortgagee under the mortgage of 1894, and mortgagor under the sale certificate of 1895. We think that as he could have had no cause of action against himself, it is impossible that those who claim under him as heirs should have any cause of action against each other upon the same materials. For these reasons we are of opinion that the decision of the lower appellate Court is right and ought to be confirmed with all costs.

G.P./R.K.

Decree confirmed.

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MACLEOD, J.

Bai Gulbai Behramsha D. Harver—
Plaintiff.

v.

*Behramsha D. Harver—*Defendant.

Original Civil Suit No. 105 of 1913,
Decided on 4th July 1913.

Parsi Marriage and Divorce Act (15 of 1865), S. 31—Suit between Parsi husband and wife—Bombay High Court has no jurisdiction to grant permanent alimony without order for judicial separation from Parsi Matrimonial Court.

The Bombay High Court has no jurisdiction in a suit between a Parsi husband and a Parsi wife to make an order for permanent alimony unaccompanied by any order for judicial separation which admittedly by itself it has no jurisdiction to grant.

It is within the exclusive jurisdiction of the Parsi Matrimonial Court to entertain suits concerning matrimonial disputes amongst the

Parsis and when the Court grants a decree for judicial separation it can order the husband to provide his wife with permanent alimony.

[P 27 C 1]

Wadia and Mooz—for Plaintiff.

Kanga and Davar—for Defendant.

Judgment.—The plaintiff, a Parsi married woman, has filed this suit for maintenance alleging that her husband has treated her with such cruelty as to render it improper that she should be compelled to live with him, and that, therefore, in law that amounts to desertion, or a failure on the part of the husband to fulfil the legal liability entailed upon him to maintain his wife. The question arises whether she is entitled to file a suit on the original side of the Court for maintenance. It appears that in England, when the ecclesiastical Courts had exclusive jurisdiction in matrimonial matters those Courts only granted maintenance or alimony when the order was coupled with a decree for what was equivalent to the present decree for judicial separation. There is no record of any ecclesiastical Court having given a decree simply for maintenance on the ground that the husband has failed to maintain his wife. The powers of the ecclesiastical Courts were handed over to the High Court in the Probate and Divorce Division by the Matrimonial Causes Acts and no authority has been cited to me to show that the High Court, either under or apart from the divorce jurisdiction, has jurisdiction to pass orders for maintenance in a suit by a wife against her husband on the ground that the husband has declined to maintain his wife. In England the Justices have now summary powers to order the husband to maintain his wife if she can prove that the husband has deserted her, and in case the Justices refuse to order maintenance there can be a reference to the High Court, and it seems clear that the application would be made to the High Court in its probate and divorce jurisdiction.

In the case of Parsis there is a special Act which establishes a special Court for the purpose of deciding matrimonial disputes amongst the Parsis, and though there is apparently no provision by which a Parsi wife can apply to the Parsi Matrimonial Court for an order of maintenance by itself on the ground of

desertion, she can on certain grounds claim that she is entitled to demand judicial separation, and on the Court granting a decree for judicial separation the Court can order the husband to provide her with permanent alimony.

Now the plaintiff in this case in her plaint alleged facts which come within S. 31, Parsi Matrimonial Act, and it seems clear that if she can establish those facts she would be entitled in the Parsi Matrimonial Court to a decree for judicial separation. She comes to this Court to establish those very facts on the ground that she is not bound to ask for a judicial separation but is entitled to get from this Court on its original side an order for permanent alimony. It seems to me clear that this Court has no jurisdiction in a suit between a Parsi husband and a Parsi wife to make an order for permanent alimony unaccompanied by any order for judicial separation, which admittedly by itself this Court has no jurisdiction to grant.

There is no question about a denial of justice because the plaintiff can file her petition in the Parsi Matrimonial Court and there establish the very facts which she relies upon in her present plaint. Apparently she has some objection to applying for a decree for judicial separation, but as I pointed out, as far as I can see, in the matrimonial Courts, both in England and India, this is the only way by which a wife is entitled to get a decree for permanent alimony.

I may add that it appears that under the Parsi Matrimonial Act such questions of fact as are alleged in this case are questions which the Act specifically directs should be tried by the Parsi delegates in the Parsi Matrimonial Court, and not by the Judge.

G.P./R.K.

Order accordingly.

A. I. R. 1914 Bombay 27

SCOTT, C. J. AND BATCHELOR, J.

Hari Govind Kulkarni — Plaintiff—Appellant.

v.

Narasingarao Nouherrao — Defendant—Respondent.

First Appeal No. 105 of 1913, Decided on 29th September 1913, from decision of Dist. Judge, Belgaum, in Darkhast No. 5 of 1912.

(a) Civil P. C. (5 of 1908), O. 21, R. 7—Executing Court cannot question jurisdiction of Court passing decree.

Under O. 21, R. 7, Civil P. C., a Court executing a decree has no power to question the jurisdiction of the Court which passed the decree. [P 27 C 2]

(b) Bombay Court of Wards Act (1 of 1905), S. 32—Act is inapplicable to pending suits.

Section 32, Bombay Court of Wards Act, was not intended to apply to pending suits.

[P 28 C 1]

S. R. Bakhle—for Appellant.

Nilkanth Atmaram—for Respondent.

Judgment.—This is an appeal against an order of the District Judge of Belgaum dismissing an application for execution of a decree, which had been passed by the Joint Subordinate Judge at Belgaum in Suit No. 246 of 1906. The decree was against defendant 1 personally and against the joint estate of defendants 1 and 2. It has not been made clear to us why the application for execution was not made to, or entertained by, the Court which passed the decree. But we will assume that the application was rightly made to the District Court. The learned District Judge dismissed the application on the ground that the decree was a nullity and incapable of execution. There are cases which were decided under the Code of 1882 in which the opinion was expressed that it is open for an executing Court to consider whether the decree sent to it for execution was passed by a Court having jurisdiction to pass it. The dictum to that effect in the Bombay Reports is to be found in *Haji Musa Haji Ahmed v. Purmanund Nursey* (1), and it was accepted in *Imdad Ali v. Jagan Lal* (2). The ratio of the dictum in *Haji Musa Haji Ahmed v. Purmanund Nursey* (1) was that the Code recognizes in S. 225 the right of the execution Court to inquire into the jurisdiction of the Court which passed the decree. That section however has been altered in the Code of 1908, for the words "or of the jurisdiction of the Court which passed it," have been omitted in O. 21, R. 7, and we think that the inference is clear that the executing Court has no power under the present Code to question the jurisdiction of the Court which passed the decree under execution. We are therefore of opinion that the learned

(1) [1891] 15 Bom. 216.

(2) [1895] 17 All. 478=(1895) A. W. N. 109.

District Judge acted ultra vires in deciding that decree which he was called upon to execute was a nullity. We further disagree with him in the reasons which he assigned for holding that the decree was a nullity. The facts upon which he based his conclusion were that on 13th May 1907, a few days before the decree, a notification was issued under S. 13, Court of Wards Act 1 of 1905, to the effect that the Court of Wards would assume superintendence of the estate of the defendants with effect from 15th May 1905. The Joint Subordinate Judge was informed of the notification, and was asked by the defendants to make the Court of Wards a party. He however declined to do so, saying that the section had no retrospective effect. Presumably by "the section," he meant S. 32, Court of Wards Act of 1905. We agree with the learned Subordinate Judge in thinking that that section was not intended to apply to pending suits. In terms it refers to suits "brought by, or against," a Government ward. The suit before the Joint Subordinate Judge was not such a suit. S. 32 must be read with S. 31, which provides that before such a suit is brought notice shall be delivered to or left at the office of the Court of Wards. This is impossible in the case of a suit pending at the time of the assumption of superintendence of the estate by the Court of Wards. Moreover, the phraseology of S. 32 relating to suits makes no such distinction as that of S. 17, which relates to execution of decrees, and provides that no proceeding in execution of any decree against the Government ward or his property shall be instituted or continued until the decree-holder files a certificate from the Court of Wards that the decree claim has been duly submitted. That apparently is the only provision which the legislature has thought necessary to make for the protection of the estate of a Government ward, where a decree has been passed in a suit instituted before the assumption of superintendence by the Court of Wards. For the above reasons we set aside the order of the District Judge dismissing the dharkhast with costs. The respondents must pay the costs, if any, of the hearing in the lower Court and the costs of this appeal.

G.P./R.K.

Order set aside.**A. I. R. 1914 Bombay 28**

HEATON AND SHAH, JJ.

Purshottam Mukund Samant—Defendant—Appellant.

v.

Rakhmabai Mukund—Plaintiff—Respondent.

Second Appeal No. 188 of 1913, Decided on 10th October 1913, against decision of Addl. Sub-Judge, 1st Class, Ratnagiri, in Appeal No. 498 of 1911.

Hindu Law—Adoption—Adoption of boy by Hindu widow—In stipulation with his father, widow reserving management in husband's estate to herself—Agreement held not binding on adopted boy.

A Hindu widow, while adopting a boy, stipulated with the natural father of the boy to have all the rights of management in her husband's estate in herself till her death :

Held : that the agreement was not binding upon the adopted boy inasmuch as it was not fair and reasonable. [P 29 C 1]

Jayakar and A. G. Desai—for Appellant.

Coyajee and K. N. Coyajee—for Respondent.

Heaton, J.—This is a case the determination of which depends upon whether a certain agreement, Ex. 61 in the case, can or cannot be given effect to. The agreement is one of a kind that has often been the occasion of litigation. It was made on the occasion of an adoption and it gives to the adoptive mother, her husband being dead, a certain control over the property which would otherwise immediately pass to the adopted son. This was with the consent of the natural father who gave his son in adoption.

Mr. Jayakar has argued the case from the side which maintains that the agreement cannot be given effect to. He has not asked us to go into the general question, an attempt to do which was very recently made and the result of which appears in the judgment in the case of *Vyasacharya Narayanacharya v. Venkubai Rangacharya Upadya* (1). All he asks us to do is to find that the agreement is not fair and reasonable and must therefore be set aside.

Now I speak of this document as an agreement, because it has been so termed. Whether technically it is an agreement or not, does not matter in the view which we take of it. It provides, to summarize it, that the widow is to continue in management of the

(1) [1913] 17 I. C. 741=37 Bom. 251.

property, that she is to retain all the rights she had of managing as long as she lives, of receiving the income, of recovering money, etc., and it further provides that she is to retain all the rights which she had in the absence of a son, and that the adopted boy is to get after her his rights. Now if effect is given to that agreement, it would mean that the widow had not only the management of the property but the unfettered right of disposing of the income. She could turn the boy out of her house and refuse to give him a single pia. I do not for a moment say that she would do this, she certainly has not done it. But if the rights of the parties were to be regulated by this agreement, she could do it and it seems to me to be very clear that a document which would make this possible cannot be regarded as a reasonable provision as between the adoptive mother and the boy whom she has taken in adoption. Therefore, applying the test which we are asked to apply as to whether these provisions are fair and reasonable, I come to the conclusion that they are not, and that consequently this agreement must be regarded as non-existent. That being so, the lady, who is the plaintiff in the case, has no right to succeed in her suit. She has prayed amongst other things for possession from her son and the effect of making a decree in her favour would be to uphold the agreement which, as I say, is neither fair nor reasonable. Consequently the decree of the lower Court must be set aside and the claim must be dismissed.

In the peculiar circumstances of this case, we think that the parties should bear their own costs throughout.

In Appeals Nos. 44 and 137 of 1913, the decision follows from that given above. In each case the appeals are allowed, and the plaintiff's claim is dismissed. The order as to costs is that each party is to bear his own costs throughout.

Shah, J.—I concur. On a consideration of the terms of the agreement which have been discussed on both sides fully before us, I have come to the conclusion that this agreement cannot be upheld as a reasonable agreement binding upon the adopted boy. The agreement in terms provides that

the widow is to have all the rights of management which she had before the adoption was made, and that the rights of the adopted son were to accrue after her death. The result of this agreement, if it were held binding upon the adopted son, would be that during the lifetime of the plaintiff he would have no right to the property whatever. The mere circumstance that the plaintiff has allowed certain concessions in favour of the adopted boy does not alter the legal position of the parties. In this view of the agreement it is clear that applying the test which has been accepted by the appellant as applicable to this class of agreements, viz., whether it is fair and reasonable, I am of opinion that the agreement is not fair to the adopted boy.

Though the lower Courts have upheld the agreement as reasonable and binding upon the adopted boy, the terms of the decree show that the agreement by itself was not found by them to be reasonable, and that by way of compromise they allowed certain rights to the adopted boy, which were outside the agreement. This tends to show that, without making substantial alterations in the agreement as indicated by the provisions of the decree, the lower Courts were not prepared to enforce the agreement against the adopted boy. The decree appealed from substitutes in effect a new agreement in place of the agreement in dispute. I am of opinion that this could not be done and that the agreement which the adoptive mother seeks to enforce against the adopted boy should not be enforced against him.

G.P./R.K.

Appeal allowed.

A. I. R. 1914 Bombay 29

HEATON AND SHAH, JJ.

Emperor.

v.

Shamji Ramchandra Gujar—Accused.

Criminal Ref. No. 128 of 1913, Decided on 29th January 1914, made by Acting Sess., Judge, Khandesh.

Criminal P. C., S. 439—Enhancement of sentence.

Enhancement of sentence is a very serious proceeding and where there is a proposal to that effect it must be supported by the Government Pleader with cogent reasons. [P 30 C 1]

P. V. Nijasure—for Accused.

Judgment.—In this particular case the circumstances are such as to require elucidation by argument. There are two distinct theories, one of deliberate deceit and the other of carelessness or negligence. Seeing that there is no appearance on behalf of the Crown to support the recommendation for enhancement of sentence, we do not think that we are called upon in this particular case to interfere.

We should like to add this comment, somewhat similar to one I have made already today. Enhancement of sentence is a very serious proceeding and where there is a proposal to that effect it ought, in my judgment, if it is a sound proposal, to be supported by the Government Pleader under instructions which will enable him to put before us cogent reasons why there should be an enhancement of the sentence.

G.P./R.K.

*Reference rejected.***A. I. R. 1914 Bombay 30**

HEATON AND SHAH, JJ.

Ramchandra Anandrao—Defendant—Appellant.

v.

Pandu Dagdu Teli and others—Plaintiffs—Respondents.

First Appeal No. 296 of 1912, Decided on 2nd December 1913, against Civil Judge, Vinchur, in Suit No. 85 of 1912.

Civil P. C. (1908), S. 100—Vinchur Court decision—Special appeal lies to Bombay High Court under S. 100.

A special appeal lies to the Bombay High Court against a decree of a Civil Judge at Vinchur on the grounds mentioned in S. 100, Civil P. C. [P 31 C 2]

S. S. Patkar—for Appellant.

R. R. Deasi—for Respondents.

Shah, J.—This is an appeal by defendant 2 against the decree passed by the Court of the Civil Judge at Vinchur in Suit No. 85 of 1912. A preliminary objection is raised by the plaintiffs that no appeal lies from the decree of the lower Court, and that if a special appeal lies it can lie only on the grounds mentioned in Cl. 99, Regn. 4 of 1827. The appeal is registered as a first appeal.

The lower Court in this case exercises its powers under Regn. 13 of 1830. It has been ascertained by this Court in the unreported case of *Bhika v. Fakirchand* (1) that the Jagirdar of Vinchur

is enumerated in the list furnished by Government, and the fact has not been disputed before us. It is clear therefore that under Cl. 1, S. 3, Regn. 13 of 1830, his decision is final, and that no first appeal in the ordinary sense lies to this Court. It is equally clear that under S. 5 of the same regulation a special appeal is open in all such cases to this Court. In two unreported cases, *Bhika v. Fakirchand* (1), and *Mahadu v. Keshav* (2), it has been held that a special appeal lies to this Court.

It was argued on behalf of the plaintiffs-respondents that as Regn. 4 of 1827, which contained the provisions relating to special appeals, had been repealed, and as there was no provision in the present Civil Procedure Code relating to special appeals, the right of appeal provided in Cl. 5, Regn. 13 of 1830 was practically non-existent. This contention appears to me to be wholly untenable. In the first place the right of appeal expressly conferred by a statute cannot be negated in this manner. Indeed, if necessary, the scope of the special appeal provided by Regn. 13 of 1830 may have to be determined by a reference to the provisions of the repealed Regn. 4 of 1827. But a reference to the statutes relating to civil procedure from time to time shows that though the expression "special" appeal does not occur in the present Code, broadly speaking, the provisions relating to second appeals correspond to the provisions relating to special appeals in Regn. 4 of 1827. It is therefore not accurate to say that there is no provision in the present Code relating to special appeals as contemplated by Regn. 13 of 1830.

It was next urged that even though a special appeal might lie to this Court, it could be entertained only on the grounds mentioned in Cl. 99, Regn. 4 of 1827. In neither of the two unreported cases mentioned to us in the argument is the nature of the special appeal distinctly specified. It may be that the point was not raised in those cases or that it was assumed that a special appeal was substantially the same as a second appeal. The point has been raised and argued before us. It is necessary to determine the nature

(1) First Appeal 4 of 1903.

(2) First Appeal 9 of 1903.

of the special appeal contemplated by Regn. 13 of 1830 before we can decide the present appeal. We have come to the conclusion that a special appeal under Regn. 13 of 1830 is synonymous with a second appeal under the Civil Procedure Code and should be heard and determined in the same manner as a second appeal is heard and determined. In other words the special appeal lies to this Court only on the grounds mentioned in S. 100, Civil P. C. It is not necessary to refer in detail to the relevant sections of different Acts. It is enough to say that a careful perusal of Cl. 99, Regn. 4 of 1827, Ss. 372 and 384, Act 8 of 1859, the repealing Act 7 of 1873 (so far as it repeals in S. 5 Regn. 12 of 1830 the words

"under the rules provided in Chap. 22, Regn. 4 of 1827, for the admission of special appeals."

Sections 7 and 584, Act 10 of 1877, Ss. 7 and 584, Act 14 of 1882 and Ss. 4 and 100, Act 5 of 1908 will show that "special appeal" contemplated by the regulation corresponds to "second appeal" under the Civil Procedure Code. Barring slight alterations it is clear that the limitations of a special appeal coincide with the limitations of a second appeal. I am inclined to think that after Act 8 of 1859, special appeals under Regn. 13 of 1830 were to be heard according to the provisions of S. 372 of the Act, and not of Cl. 99, Regn. 4 of 1827, as apparently there was nothing inconsistent in the rules relating to special appeals in the Act with the specific provisions of Regn. 13 of 1830. It is not necessary however to come to a definite conclusion on this point. It is quite clear that after the repealing Act 12 of 1873 there was nothing inconsistent in the Act of 1859 or in any of the subsequent statutes with any provisions of Regn. 13 of 1830, which could stand in the way of hearing and determining special appeals under the regulation in the same manner as special appeals under Act 8 of 1859 or as second appeals under Acts. 10 of 1877, 14 of 1882 and 5 of 1908. A mere change in phraseology cannot make any difference in the result. Special appeals are practically the same as second appeals. I may add that I have not overlooked the change in the wording of S. 4 of the present Code as compared with S. 7, Act. 14 of 1882.

But I am clear that it is only another way of expressing the same thing; the result is the same. I therefore overrule the preliminary objection and hold that a special appeal lies to this Court, and that it lies only on the grounds mentioned in S. 100, Act 5 of 1908.

On the merits the appellant has no case. There is no error of law. The decision of the lower Court is based upon an appreciation of evidence, with which we cannot interfere in this special appeal. I, therefore, confirm the decree of the lower Court with costs.

Heaton, J.—My consideration of this matter has led me to the same conclusion for substantially the same reasons.

G.P./R.K.

Decree confirmed.

A. I. R. 1914 Bombay 31

BEAMAN, J.

Roopchand Rangildas—Plaintiff.

v.

Haji Hussein Haji Mahomed Saudagar—Defendant.

Civil Suit No. 1028 of 1913, Decided on 12th February 1914.

Bombay High Court Rules. R. 107—Rule falls under S. 27 General Clauses Act—Summons sent through registered post—Onus of proving actual delivery or tender lies on defendant—Evidence Act, S. 114, ill. (f).

Rule 107, Bombay High Court Rules, falls under S. 27, General Clauses Act (10 of 1897). Therefore if the summons in a registered cover be tendered and refused by the defendant he refuses at his own risk; where he disputes the actual delivery or tender of delivery it is a mere question of fact and the onus is on him.

[P 32 C 1]

Athavale—for Plaintiff.

Judgment.—The first question to be answered is, whether R. 107, High Court Rules falls under Cl. 27, General Clauses Act. Reading Ss. 129 and 131, Civil P. C., together, I think that that question must be answered in the affirmative. Noting a judgment of Robertson, J., in *Baluram Ramkisan v. Bai-Pannabai* (1) I may incidentally remark that in none of the cases commented on by that learned Judge was Cl. 27, General Clauses Act, 1897 referred to, for the obvious reason that it had no application. It could only apply to cases of the kind arising after 1897 and under the new Civil Procedure Code.

Applying that section now it is also

(1) [1911] 11 I. C. 351=35 Bom. 218.

clear that it provides that service shall be deemed to have been effected (in appropriate cases, of which this is one) by the posting of the document in a duly prepaid and registered cover, etc. and that the date of such service shall unless the contrary be proved be deemed to be when the registered letter would in due course have been delivered. Thus it lies on the defendant in this case to prove that it was not delivered. I think for all practical purposes that the point is actual delivery and that the defendant may not take advantage of his own refusal to accept delivery when tendered. That is to say if the summons in a registered cover be tendered to, and refused by him, he refuses at his own risk. Where he disputes the actual delivery or tender of delivery, it is a mere question of fact, and the onus is on him. I am, therefore, only to consider here whether in fact the registered cover despatched on 21st November was actually, and in fact, tendered to the defendant Anvarkhan on 3rd December.

If it was not, then there was no delivery and no service; if it was, then there was effected service within the meaning of S. 27, General Clauses Act.

G.P./R.K. *Order accordingly.*

A. I. R. 1914 Bombay 32

SCOTT, C. J. AND BATCHELOR, J.
Ahmedbhoy Habibbhoy—Appellant.

v.

Waman Dhondhu and others—Respondents.

Second Appeal No. 565 of 1911, Decided on 18th November 1913, against Dist. Judge, Thana, in Appeal No. 129 of 1909.

Land Acquisition Act (1894), S. 54 — No second appeal lies in land acquisition cases — Civil P. C. (1908), S. 96 (1) — Bombay Civil Courts Act (1869), S. 16.

As no second appeal is allowed by law in a land acquisition case, no appeal would lie in the High Court when on a reference under the Land Acquisition Act, an Assistant Judge awarded less than Rs. 5,000 and an appeal against his award was dismissed by the District Judge. [P 32 C 2]

D. G. Dalvi—for Appellant.

R. W. Desai—for Respondents.

Judgment.—In this case an award was made under the Land Acquisition Act which did not exceed Rs. 5,000. The reference to the Court was in accordance with the provisions of the

Bombay Civil Courts Act, to the Assistant Judge, and he tried the reference. Under the same Act an appeal lay to the District Judge as the amount or value of the subject-matter did not exceed Rs. 5,000, and he heard the appeal. That was analogous to an appeal from an original decree.

An appeal is now preferred from the decision of the District Judge to the High Court, and the question is whether such appeal lies. An appeal lies only if it is expressly given by the Act. It does not lie merely by analogy to appeals in civil suits: see *Rangoon Botatung Company Ltd. v. Collector, Rangoon* (1).

Now an appeal lies to the High Court in proceedings under the Land Acquisition Act under the conditions specified in S. 54 of that Act. That section says:

"Subject to the provisions of the Code of Civil Procedure applicable to appeals from original decrees, an appeal shall lie to the High Court from the award, or from any part of the award, of the Court in any proceedings under this Act."

The section is there obviously dealing with appeals from original decrees, and impliedly it recognizes that there may be cases in which the appeal from the original decree will not lie to the High Court.

Turning to the provisions of the Civil Procedure Code relating to appeals from original decrees we find that S. 96 (1) provides:

"Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie from every decree passed by any Court exercising original jurisdiction to the Court authorized to hear appeals from the decisions of such Court."

Now, under S. 16, Bombay Civil Courts Act, the Court authorized to hear appeals from the Assistant Judge's Court where the value of the subject-matter is less than Rs. 5,000 is the District Court and not the High Court. We are therefore of opinion that the preliminary objection is good that the appeal to the High Court is not maintainable. One set of costs.

G.P./R.K.

Appeal dismissed.

A. I. R. 1914 Bombay 33

SCOTT, C. J., AND BATCHELOR, J.
Secretary of State—Appellant.

v.

J. E. Hughes—Respondent.

First Appeals Nos. 32 and 41 of 1913,
 Decided on 13th October 1913, from
 decision of Dist. Judge, Poona, in Civil
 Suit No. 3 of 1912.

(a) **Jurisdiction**—Tax of club increased in
 contravention of Poona Cantonment Taxa-
 tion Regulation (1881)—Tax paid under
 protest—Appeal to Cantonment Committee
 rejected—Civil Court held to have juris-
 diction to entertain suit to recover money.

A Cantonment Magistrate, disregarding the
 Cantonment Taxation Regulations, increased
 the tax of club which was paid with protest
 and an appeal to the Cantonment Committee
 was rejected.

Held: that the Civil Court had jurisdiction
 to entertain a suit to recover the money as the
 money was claimed and received from the club
 without the shadow of a right. [P 35 C 2]

(b) **Limitation Act, Art. 64**—Payment by
 cheque—Limitation to recover money runs
 from date of receipt of money by payee.

Where money is paid by cheque the limita-
 tion to recover the money runs from the date
 of the receipt of the money by the payee and
 not from the date of the delivery of the cheque.
 [P 35 C 2]

Strangman and S. S. Patkar—for Ap-
 pellant.

Weldon and Cragie & Co.—for Res-
 pondent.

Judgment.—This suit was instituted
 by the plaintiffs to recover payment of
 the amount of taxes levied by the Can-
 tonment authorities at Poona, which
 the plaintiffs paid under protest on the
 ground that the assessment was illegal.
 The learned District Judge, by whom
 the case was heard, disposed of it in
 favour of the plaintiffs, and this appeal
 has been preferred by Government on
 two grounds: first, that the Court had
 no jurisdiction to entertain the suit;
 and, secondly, that in respect of a por-
 tion of the money claimed the suit is
 barred by the provisions of Art. 62,
 Limitation Act.

The argument on the question of
 jurisdiction amounted to this: Accord-
 ing to the assessment rules certain
 authorities have been constituted for
 the assessment of taxes, and their assess-
 ment is final, except in so far as any
 question may arise as to the legality
 of other action having regard to the
 jurisdiction conferred upon them by the
 assessment rules, and it was contended
 that the assessment of the tax com-

1914 B/5 & 6

plained of by the plaintiff was a pure
 question of fact and not of law, and
 that, therefore no question arose for the
 decision of a Court of law, on the
 analogy, I presume, of applications in
 revision to the High Court under S. 115
 Civil P. C. The contention that the
 assessment of the tax raises a pure
 question of fact was based upon a
 passage from the judgment of Lord
 Halsbury in the *Mersey Docks and Har-
 bour Board v. Birkenhead Assessment
 Committee* (1); but if that judgment is
 read as a whole it does not, as we shall
 have occasion to show later on, support
 the appellant's contention.

The rules affecting the taxation for
 cantonment purposes of occupiers in
 Poona were framed by the Government
 of Bombay under the powers conferred
 by S. 22, Cantonment Act, 1880, powers
 which have been continued substantially
 in the same words through various
 Cantonment Acts up to the present time.
 Under those enactments it is provided
 that the Local Government may, by
 notification in the official Gazette im-
 pose in any Cantonment, which is
 not included in the Municipality,
 any tax which, under any enactment
 in force at the date of the notification,
 can be imposed in any Municipality
 within the territories administered by
 such Government; and that when any
 tax is leviable in a cantonment in pursu-
 ance of such notification the Local
 Government may by notification apply
 or adapt to the Cantonment the provi-
 sions of any enactment or rules in force
 at the date of the notification in any
 Municipality within the territories
 aforesaid relating to the assessment,
 collection or recovery of any tax, and
 refund or revision of or exemption from
 any such tax.

In intended execution of the powers
 conferred by S. 22, Cantonment Act, 1880,
 the Poona Cantonment Taxation Regula-
 tions were notified in the year 1881 which
 purported to adapt the taxation provi-
 sions of the City of Bombay Municipal Act
 1872 and 1878. According to such
 adaptation the Cantonment Magistrate
 took the place of the Municipal Commis-
 sioner, and the Cantonment Committee
 took the place of the Court of Petty

(1) [1901] A. C. 175=70 L. J. K. B. 584=65 J.
 P. 579=49 W. R. 610=84 L. T. 542=17
 T. L. R. 445.

Session for the purpose of hearing appeals against rates. The regulations with which we are concerned in this appeal are Regns. 1, 2, 7, 8, 10, 13, 15 and 42. Regn. 1. provides that

"the estimated gross annual rent at which the houses, buildings and lands liable to property rates might reasonably be expected to let from year to year shall for the purposes of the said rates be held and deemed to be the annual value of such houses, buildings and lands."

Regulation 2 provides that "the rates shall be leviable from the actual occupier if he hold the house, building or land immediately from Government."

By the Government Notification of 17th September 1891 a general property rate of 4 per cent. per annum of the annual value of houses, buildings and lands liable to property rate was imposed on the Cantonment of Poona, and the plaintiffs as occupiers of the race course in the Cantonment, which they held immediately from Government were liable for the rate.

Until the year 1908 the plaintiffs had been called upon to pay a tax of Rs. 201, assessed upon an estimated gross letting value of the race course property of Rs. 5,038. On 8th October 1908 they received the following notice from the Cantonment Magistrate:

"Under Poona Cantonment Taxation Regulations the Cantonment Magistrate hereby gives notice to the Secretary, Western India Turf Club, with regard to the property indicated in the margin that he has revised the valuation of the said property, and assessed the rate at Rs. 9,840 per annum on an annual income of Rs. 2,46,000, and that any complaints against such valuation must be made to the Cantonment Magistrate in writing and received at this office within three days from the service of this notice."

This therefore was a case falling under Regn. 10 under which the rates might be increased; that regulation provides that

"notice of the amendment shall be given to the person interested and the date fixed for the hearing of complaints which shall be made and heard in the manner prescribed in S. 8 for complaints concerning original rates in the assessment book."

Regulation 8 provides that "all complaints against valuations shall be made to the Cantonment Magistrate by application in writing left at his office three days before the day fixed in the public notice for revising the valuations and rates," the public notice being the notice provided for by Regn. 7 which must prescribe a day, not being less than fifteen days from the publication of notice, when the Magistrate will proceed to revise

the valuations and rates. It is therefore apparent that the Cantonment Magistrate in notifying that any complaints against the increased rate must be made within three days from the service of his notice of 8th October 1908 was disregarding the express provisions of the regulations.

It is contended, however that such disregard of the regulations is of no importance under Regn. 42, provided the directions in the regulations have been in substance or effect complied with and that if that is so, the action of the Cantonment Magistrate cannot be quashed or set aside in any Court. It appears to us that the Regulations have not been in substance or effect complied with. The plaintiffs are called upon within three days to show cause why the rate imposed upon them should not be raised from Rs. 201 to Rs. 9,840. Such a serious demand was a matter requiring very attentive consideration; and reasonable time was not given to the plaintiffs to take any advice upon the subject. On that ground alone therefore we think that the action of the Cantonment Magistrate was not warranted by the regulations. An appeal was preferred from his assessment to the Cantonment Committee under Regn. 13. The Cantonment Committee only have jurisdiction to hear an appeal against a rate provided it is charged under the provisions of the foregoing regulations. The appeal to that Committee resulted in a curt resolution as follows:

"Resolved that the appeal of the Turf Club be rejected,"

and the request for reasons for this resolution was met by a further resolution as follows:

"Resolved that the solicitors to the Turf Club be informed that the Committee consider that they are not bound to record their reasons for rejecting an appeal."

The Turf Club then appealed to the Governor in Council, but they were informed that under the regulations the Governor in Council had no power to interfere with the decision of the Cantonment Committee which, according to the provisions of Regn. 15, was to be final. It is not surprising under the circumstances that the plaintiffs paid their tax under protest, and have filed this suit for the recovery of the same as money had and received for their use.

Up to this point we have dealt with the objection to the action of the Cantonment Authorities on the ground of procedure and, for the reasons stated, we think that the objection is well founded, that the Cantonment Magistrate did not charge a rate under the provisions of the regulations, an appeal with reference to which could be heard and determined by the Cantonment Committee.

But there is a more serious objection than that caused by the procedure laid down in the regulations. It is this: that the Cantonment Magistrate has wholly disregarded the basis upon which the rate is to be assessed. He has assessed a rate upon the gross income of the plaintiffs, which would not even be a basis for the levy of income-tax. Even if the plaintiffs' net profits, which average about Rs. 30,000 a year, had been taken as the basis of valuation it is clear, for the reasons stated by the District Judge, that no hypothetical tenant could be expected to offer such a sum as rent for the property in question, for as the District Judge points out:

"if the plaintiffs were to let the race course and buildings for more than about Rs. 30,000 a year, it is obvious that their tenant would conduct business at a loss,"

and if they were to let it for that sum only he would make no profit. It would, therefore, not be reasonable to expect that he would offer such a rent. It appears to us that the judgment of Lord Halsbury, in *Mersey Docks and Harbour Board v. Birkenhead Assessment Committee* (1), already referred to, so far from being any authority in favour of the contention of the appellants, is a direct authority for the proposition that where a taxing authority is called upon to assess the tax based upon annual letting value, he does very wrong indeed if he rates as if he were dealing with the question for the income-tax. The Cantonment Magistrate has, as stated by the District Judge,

"not calculated the tax on the annual value, but on some strange and novel method of his own. The law does not justify his action at all. It was outside the law, and he has assumed powers which the law has not given to him. The enhancement of the tax was, therefore, ultra vires, and not a legitimate method of arriving at a fair letting value of the house."

It is, therefore, clear upon the autho-

rity of *Kasandas v. Ankleshwar Municipality* (2) that the case is one in which the jurisdiction of the civil Courts is not ousted. The money has been claimed and received from the plaintiffs without the shadow of a right, and the plaintiffs having paid under protest are entitled to recover the money unless their claim is barred by limitation. It is only contended that their claim is barred in respect of the first payment made by them for one half-year, being the sum of Rs. 4,819-3-10. A cheque for that sum was given to the Cantonment Magistrate by the Turf Club on 28th November 1908, but it was not cashed by him; and on 5th May 1909, he wrote saying that he had made a mistake in the figure which should be Rs. 4,671, and that the cheque drawn on 28th November would be returned on payment of the sum of Rs. 4,671. The first cheque was however cashed on 27th May 1909. This suit was instituted on 28th March 1912, more than three years after the delivery of the cheque, but less than three years after the cashing of the same. We are of opinion that limitation runs, not from the date of the delivery of the cheque, but from the date of the receipt of the money by the payee, and that therefore Art. 62 is no bar to the plaintiffs' claim in respect of this payment. The appeal therefore must be dismissed.

We would add for the consideration of the Government an observation on a question which it has not been necessary to decide, having regard to the success of the plaintiffs upon the points raised by them. It is this: whether the Cantonment Taxation Regulations can be regarded as an adaptation of the provisions of the taxation sections of the City of Bombay Municipal Act of 1872 and 1878 in respect of appeals from rates. Those sections allowed an appeal to the Court of Petty Session, that is to the Presidency Magistrate, a judicial tribunal, whereas Regn. 13 of the Poona Regulations gives the appeal to the Cantonment Committee, which is a lay body, one of the most important members of which is the Cantonment Magistrate, from whom the appeal is preferred.

The plaintiffs must have their costs of this appeal and of the next appeal

(2) [1902] 26 Bom. 294=3 Bom. L. R. 882.

which fails with the failure of this appeal.

G.P./R.K.

Appeal dismissed.

A. I. R. 1914 Bombay 36 (1)

HEATON AND SHAH, JJ.

Emperor—Prosecutor.

v.

Ragha Jaga—Accused.

Criminal Ref. No. 95 of 1913, Decided on 19th January 1914, made by Dist. Magistrate, Kaira.

Criminal Trial—Deterrent sentence.

Where it is desired by the authorities that an example should be made or that specially deterrent sentence should be imposed, it is their duty to bring that desire to the notice of the trying Court and to inform the trying Court of reasons for the suggestion. [P 36 C 1]

S. S. Patkar—for the Crown.

Judgment.—A certain police sepoy was convicted of the offence of overstaying his leave, or rather of not returning to duty on the expiration of his leave. He was prosecuted and convicted and sentenced to a fine of Rs. 3. The District Magistrate has submitted the papers to us for the purpose of enhancing the sentence.

We certainly think that a sentence of this kind for an offence of this nature is quite inappropriate if the offence is of the kind that appears in this case—the deliberate refusal to return to duty on the part of a police officer or a police sepoy on the expiration of a short period of leave. At the same time it is now more than four months since this case was disposed of. It is not shown that there is any particular necessity to make an example of the offending sepoy. Consequently the particular circumstances of this case are not such as in our judgment would overcome the very proper and the very desirable reluctance of this Court months afterwards to send to jail a man who has been tried and convicted and who has fulfilled the sentence that has been imposed upon him.

We should like to add this also that in cases of this kind, indeed in cases of any kind where it is desired by the authorities that an example should be made or that a specially deterrent sentence should be imposed, it is their duty to bring that desire to the notice of the trying Court and to inform the trying Court of the reasons which they put forward in support of the suggestion.

Therefore we decline to interfere in

this case and return the record and proceedings.

G.P./R.K.

Records returned.

A. I. R. 1914 Bombay 36 (2)

SCOTT, C. J., AND BATCHELOR, J.

Narayan Balkrishna — Defendant—Appellant.

v.

Gopal Jiv Ghadi and others—Plaintiffs—Respondents.

Second Appeal No. 138 of 1912, Decided on 22nd January 1914, from decision of First Class Sub-Judge, Ratnagiri, in Appeal No. 410 of 1910.

(a) **Civil P. C. (5 of 1908), S. 2—Suit for redemption and accounts under Dekkan Agriculturists' Relief Act — Court referring taking of accounts to Commissioner under O. 26, R. 11 — Issue of commission held not to constitute preliminary decree within S. 2—Civil P. C. (1908), O. 26, R. 11.**

In a suit for accounts and redemption under the Dekkan Agriculturists' Relief Act the Court before passing the decree for possession investigated certain questions of fact in issue between the parties with reference to the amounts due in respect of different mortgages and different plots of land, and then instead of making the final mortgage account itself referred the taking of the account to a Commissioner under O. 26, R. 11, Civil P. C.

Held : that the issue of a commission, or the instructions which were recorded for the benefit of the Commissioner at the time of the commission, did not constitute a preliminary decree within the meaning of S. 2, Civil P. C.

[P 38 C 1]

(b) **Civil P. C. (1908), S. 2 — Meaning of "rights of parties" stated.**

The rights of the parties in regard to matters in controversy, referred to in S. 2, Civil P. C., mean general rights such as rights in relation to status, in relation to jurisdiction, in relation to limitation, in relation to frame of the suit, and in relation to liability of accounts, which, if decided, must have a general effect upon the proceedings in the suit, and can be decided preliminary to the investigation of the matters in dispute between the parties upon the merits. [P 37 C 2]

K. N. Koyajee—for Appellant.

A. G. Desai—for Respondents.

Judgment.—The plaintiffs sued to have an account taken under the provisions of the Dekkan Agriculturists' Relief Act of all transactions from the commencement in connexion with two mortgages of 20th December 1865 and 21st December 1865, and to have the amount due determined, and to obtain a decree for redemption.

The learned Subordinate Judge, on 30th August 1910, passed a decree for the plaintiff for possession of the property, except one survey number, free

from incumbrances, the defendants having received profits for 25 years after the debt had been paid off. Before passing that decree the learned Judge had investigated certain questions of fact in issue between the parties with reference to the amounts due in respect of different mortgages and different plots of land. Then, instead of making up the final mortgage account himself, he, as is permissible under the Civil Procedure Code, referred the taking of the account to a Commissioner. The Code provides, O. 26, R. 11, that :

"in any suit in which an examination or adjustment of accounts is necessary the Court may issue a Commission to such person as it thinks fit directing him to make such examination or adjustment ;"

and R. 12 (2) provides that :

"the proceedings and report (if any) of the Commissioner shall be evidence in the suit, but where the Court has reason to be dissatisfied with them it may direct such further inquiry as it shall think fit."

In the present case the work of the Commissioner appears merely to have been the ascertainment of the figures based upon the facts found by the Subordinate Judge, and the figures having been furnished by the Commissioner, and neither party objecting, the Court found the fact to be that the whole debt had been paid out of the profits of the mortgage property, and passed the decree already referred to.

From that decree an appeal was preferred to the First Class Subordinate Judge, with appellate powers, and a preliminary objection was taken that the appeal was time barred, inasmuch as time ran from the date when the Court issued the Commission to the Commissioner to take the account on the ground that the issue of a Commission or the instructions which were recorded for the benefit of the Commissioner at the time of the issue of the Commission constituted a preliminary decree within the definition of S. 2, Civil P. C. This preliminary point found favour with the appellate Court and the appeal was accordingly dismissed, because the matters decided by the Subordinate Judge on the question in issue between the parties were decided in fact by 15th August when he issued his directions to the Commissioner.

The learned Judge of the appellate Court held the decision of 15th August to be the formal expression of an adjudi-

cation which, so far as regarded the Court of the Subordinate Judge, conclusively determined the rights of the parties with regard to the manner in which accounts should be taken, and was therefore a preliminary decree within the meaning of S. 2 of the Code, and as such was appealable. The words :

"with regard to the manner in which accounts should be taken"

appear to have been selected from a judgment of this Court in *Krishnaji Sakharam Kulkarni v. Maruti Appa* (1), but they were selected without due regard to the question which was before the Court in that case. The question was as to the status of the plaintiff, whether he was entitled to the special rights of the favoured class under the Dekkan Agriculturists' Relief Act in the matter of demanding accounts from the mortgagee. It was a decision with regard to the general right of the plaintiff and the general liability of the defendant, without reference to particular questions of fact which might be in issue between the parties in an investigation of the merits of their particular cases after it had been decided what law was applicable to them. In applying the definition of the Civil Procedure Code of 1908, S. 2, it will be found that in the reported cases in this Court the rights of the parties in regard to matters in controversy are taken to mean general rights such as rights in relation to status, in relation to jurisdiction, in relation to limitation, in relation to frame of the suit and in relation to liability to account, which if decided, must have a general effect upon the proceedings in the suit and can be decided preliminary to the investigation of the matters in dispute between the parties upon the merits.

In the present case what was decided on 15th August at the time of the issue of the Commission was not any general question of right, such as had been referred to, but merely a number of different points in dispute upon the merits of the case between the parties. The learned Judge passed no decree upon the merits. He was waiting for the Commissioner to send in his calculation which would form an item in the evidence to be taken into consideration before framing the decree.

(1) [1910] 7 I.O. 966=12 Bom. L.R. 762.

We therefore think that the learned Judge of the appellate Court was in error in dismissing this appeal, for there was nothing in the Code which prevented him from entertaining it inasmuch as there was not a preliminary decree within the meaning of S. 97. We therefore set aside the decree and remand the case to the lower appellate Court for disposal on the merits.

Costs, costs in the appeal.

G.P./R.K. *Decree set aside.*

*** A. I. R. 1914 Bombay 38**

SCOTT, C. J., AND BATCHELOR, J.

Bachoo Harkisondas—Defendant—Appellant.

v.

Nagindas Bhagwandas — Plaintiff — Respondent.

Original Civil Appeal No. 58 of 1913, Decided on 2nd February 1914, from judgment in Suit No. 1886 of 1912.

*** (a) Hindu Law—Partition—Partition of ancestral property between adopted grandson and natural grandson—Former is entitled to one-fifth of ancestral property and latter to four-fifths.**

According to the Hindu law, on the partition of ancestral property between the adopted son of a natural son of a common ancestor and the natural son of another natural son of the common ancestor, the former is entitled only to one-fifth of the property, the remaining four-fifths going to the latter. [P 41 C 1]

(b) Hindu Law—Adoption—Dattaka Chandrika—Authority of.

The Dattaka Chandrika is in the Bombay High Court a leading authority on the subject of adoption. [P 39 C 1]

Raiker, Setlur, Desai and Strangman—for Appellant.

Setalvad, Bhandarkar, Kanga, Jayakar and Inverarity—for Respondent.

Judgment.—This is an appeal from a decision of Macleod, J., with reference to the rights of the plaintiff in the joint ancestral property, in which, it is admitted, he and the defendant Bachoo are interested. The common ancestor of the parties was Nagardas Sobhagchand, and this suit is based upon the allegation that the property now in dispute is ancestral property coming from Nagardas. Nagardas had two sons Harkisondas and Bhagwandas. Harkisondas died on 14th September 1900 leaving a widow Gangabai who was then pregnant. Bhagwandas died on 17th December 1900 leaving a widow Mankorebai, to whom he had given authority to adopt. On 18th December the defendant,

Bachoo, was born to Harkisondas and on 17th February 1901, Mankorebai adopted the plaintiff, Nagindas. It has been held in Suit No. 128 of 1901 that Nagindas was validly adopted into the family, but no decision was given as to the share to which he would be entitled upon a partition. That is the question which arises in the present suit.

The parties being Gujaratis are governed by the law of Mitakshara, except where it conflicts with the provisions of the Mayukha. The defendant contends that he, as the natural son of his father, is entitled to a share four times as large as that of the plaintiff, on the ground that an adopted son is entitled only to a fourth of the share of a legitimate natural son. If the defendant is entitled to a larger share on the ground that he is the natural born son of his father, it is not disputed that in this Presidency the plaintiff will only be entitled to take a share equal to one-fourth of the defendant's share, that is to say, one-fifth of the entire property. The question of the quantum of the share not being in dispute, the only question we have to decide is whether the defendant is right in his contention that he can claim a preferential share. The point has been decided upon facts similar to those in the present case by a Bench of the Calcutta High Court in *Raghubanund Doss v. Sadhu Churn Doss* (1). The parties were, as here, governed by the Mitakshara law and the Court basing its decision upon a passage in S. 5, Dattaka Chandrika (verses 24 and 25) held that the adopted son of a predeceased natural son of a common ancestor could not share equally on partition with the natural son of another predeceased natural son of the common ancestor. The decision has been criticized by Mr. Mayne who (in S. 190 of his book) would confine the application of the passage in the Dattaka Chandrika to cases of the competition with a paternal uncle of an adopted son of the deceased owner of the estate. That result is arrived at by the assistance of certain glosses or additions to be found in Sutherland's Translation which are not in the original and his conclusion is not possible upon the translation furnished by Sir Ramkrishna Bhandarkar and accepted by the parties. According to

(1) [1879] 4 Cal. 425=3 C.L.R. 534.

the translation adopted by the Court in *Raghubanund Doss v. Sadhu Churn Doss* (1) of the passage in question and according to a translation made by Sir Ramkrishna Bhandarkar, there can be no doubt that the Dattaka Chandrika, if applicable, does assign to the adopted grandson the inferior share. That is conceded by the learned Judge, but he says that the rule laid down in that work is in conflict with the provisions of the Mitakshara, and therefore, cannot be given effect to between the parties. He has accordingly passed a decree for partition equally between the plaintiff and the defendant Bachoo. The defendant appeals, and it is contended on his behalf that the learned Judge is in error in thinking that there is any conflict between the rule as laid down by the Dattaka Chandrika and the rule which must be evolved by an application of the law as enunciated in the Mitakshara. It has been said by a Full Bench of this Court that the Dattaka Chandrika is in this Court a leading authority on the subject of adoption: see *Waman Raghupati Bova v. Krishnaji Kashiraj Bova* (2). The learned Judge bases his decision upon the assumption that under the Mitakshara law in the case of a partition the primary division is per stirpes irrespective of the quality or quantity of the members belonging to each stirps, and therefore the first division must and can only be half and half as if Bhagwandas and Harkissondas had equally vested interests in the joint family property. This line of reasoning was rejected by Markby, J., in *Raghubanund Doss v. Sadhu Churn Doss* (1) and is inconsistent with the law enunciated in *Debi Parshad v. Thakur Dial* (3) after a careful examination of the Mitakshara. The opinions expressed in those cases are in accord with the fifth verse of Nilkanth in S. 1 of the Mayukha where he says:

"Now the pre-existing undefined ownership of more than one brother, etc., is defined by partition."

That portion of the Mitakshara, with which we are concerned, is divided into two chapters, the first of which after some definitions deals with what is described as inheritance not liable to obstruction, while the second chapter deals with inheritance liable to obstruction. The

whole of the two chapters is stated in the first placitum to be an explanation of the partition of heritage and heritage is stated to signify wealth which becomes the property of another solely by reason of his relation to the owner. According to placitum 3, inheritance not liable to obstruction is the wealth of a father and of the paternal grandfather which becomes the property of his sons and grandsons in right of their being such sons and grandsons. Property liable to obstruction is property which devolves upon other relations upon the death of the owner in default of male issue, and the existence of such a son and the existence of the owner are therefore obstructions to such inheritance.

Chapter 1 therefore being concerned with inheritance not liable to obstruction deals successively with the rights on partition of the inheritance of different classes of sons. S. 2 of that chapter deals with the case of a partition made by the father in his lifetime, in which event he is entitled to give the eldest the best share, the other sons being given equal shares. That class of partition is now obsolete. (It is moreover in S. 5, v. 7, limited by Vijnaneshwara to the father's self-acquired property.)

Section 5 deals with the allotment of shares to grandsons, and here the author applies the principle of distribution per stirpes which the learned Judge doubtless had in mind in that part of his judgment to which reference has been made. The text of Yajnavalkya, upon which the dissertation is based, is as follows:

"But among grandsons by different fathers the allotment of shares is according to the fathers."

Vijnaneshwara in commenting upon the text says:

"Although the ownership by birth of the grandsons in the wealth of the grandfather is without distinction from that of sons, yet the determination of their shares in the grandfather's wealth is through the door of the father only and not with reference to their own selves."

This translation is baldly literal. The meaning is illustrated as follows:

"If any separated brothers die leaving male issue and the number of sons be unequal, one having two sons, another three and a third four, the two receive a single share in right of their father; the other three take one share appertaining to their father; and the remaining four similarly obtain one share due to their father. And the sons of deceased

(2) 14 Bom. 249 at p. 259.

(3) 1 All. 105.

brothers receive the shares of their own fathers."

This is a rule which lays down the maximum share to which as a group grandsons begotten by the same father are limited. It does not in terms lay down that grandsons of different qualities will necessarily have equal rights in the ancestral estate. Section 6 relates to the rights of a posthumous son and of one born after partition. Section 8 relates to the unequal interests of sons born by wives of the same father who belong to different castes of unequal position. Section 10 relates to the rights of the Dvyamushyayana or son of two fathers, that is, his natural and his adoptive father. Section 11 deals with sons by birth and sons by adoption. That is the heading of the section in Colebrooke's Translation, and for practical purposes the heading will suffice, although the section really deals with twelve classes of sons; for the sons by birth and the sons by adoption are the only two classes of sons recognized at the present day. And this was so even in the 17th century, the time of Nilkantha, the author of the Mayukha, who says (S. 4, v. 46) that with the exception of the given son secondary sons are set aside in the Kali or present age. In this connexion Sir Henry Maine in his *Early Law and Custom*, p. 100, observes:

"The growing popularity of adoption, as a method of obtaining a fictitious son, was due to moral dislike of the other modes of affiliation which was steadily rising among the Brahman teachers in the law schools."

Regarding adoption by a widow after the death of her husband, he remarks on p. 108:

"That the capacity of the widow to produce a son to her deceased husband through the Levirate has . . . led to the power very generally vested in her by Hindu law and usage of taking a son to her deceased husband by simple adoption."

The Section 11 is important for the purposes of this suit, for it distinguishes between the shares of sons by birth and other sons of inferior "quality" (to use the expression of the learned Judge in the passage above cited). The first placitum of that chapter is as follows:

"A distribution of shares, among sons equal or unequal in class, has been explained. (That is a reference to S. 8). Next, intending to show the rule of succession among sons, principal and secondary, the author describes them."

Then is set out the classification of sons into twelve classes according to Yajnavalkya. After comments upon each class described by Yajnavalkya that Sage's succeeding text is set out and discussed. The text is:

"Among these the next in order is heir and presents funeral oblations on failure of the preceding."

In placitum 22 the commentary proceeds:

"Of these twelve sons above mentioned, on failure of the first, respectively the next in order, as enumerated, must be considered to be the giver of the funeral oblation or performer of obsequies, and taker of a share or successor to the effects."

Placitum 23:

"If there be a legitimate son and an appointed daughter, Manu propounds an exception to the seeming right of the legitimate son to take the whole estate."

Placitum 24:

"So the allotment of a quarter share to other inferior sons, when a superior one exists, has been ordained by Vasishtha: 'When a son has been adopted, if a legitimate son be afterwards born, the given son shares a fourth part'."

Placitum 25:

"Accordingly Catyayana says: 'If a legitimate son be born the rest are pronounced sharers of a fourth part, provided they belong to the same tribe; but if they be of a different class they are entitled to food and raiment only'."

It will here be seen that Vijnaneshvara takes the text of Vasishtha to be an authority for the allotment of a quarter-share to an inferior son when a superior one exists. The inferiority of the adopted son to the natural-born son is forcibly illustrated by a text of Vrihaspati (XV. 34):

"As in default of ghee, oil is admitted by the virtuous as a substitute at sacrifices so are the eleven sons admitted as substitutes in default of a legitimate son of the body and of an appointed daughter."

It is also well illustrated by the discussion in the Mayukha (a comparatively modern commentary and one of special authority among Gujaratis to which division the parties to this suit belong) regarding the Dvyamushyayana, the son of two fathers, S. 5, pl. 25:

"If both (the natural and the adoptive father) have legitimate sons he offers an oblation to neither, but takes a quarter of the share allotted to a legitimate son of his adoptive father from this text of Vasishtha: 'When a son has been adopted', etc."

It is upon this text of Vasishtha that the passage in the Dattaka Chandrika, to which we are asked to give effect, is based. Mr. Golapchandra Sarkar in his *Treatise of Hindu Law*,

p. 171 (4th Edition) thus concisely describes the effect of the passage :

"But the author of Dattaka Chandrika extends this rule of difference in shares to cases of partition between male descendants in the male line down to the great-grandson where there is competition between an adopted and real descendant. He does so by analogy which would make the rule applicable to all cases in which there is competition between a real and an adopted relation."

It appears to us that there is nothing in the chapter of the Mitakshara relating to inheritance not liable to obstruction which is in conflict with the rule evolved by the author of the Dattaka Chandrika, for, as we have pointed out, Section 5 of the Mitakshara, in dealing with the allotment of shares among grandsons is in no way concerned with the "quality" of the individual sharer ; while S. 9 affirms most distinctly the inferiority as a sharer of the adopted to the natural-born legitimate son of the owner of the inheritance. But it is argued that the owner of the inheritance in this case is Nagardas and that the discussion of sons in S.11 does not warrant the application to grandsons of the disabilities of sons. It is however to be observed that placitum 22 declares that the right to share and the right to give the funeral oblation, go together. It cannot be, and is not, disputed that of the two competitors in the present case Bachoo is the proper descendant to offer the funeral cake to his grandfather Nagardas. Nor can it be disputed that the word "son" (putra) in various passages in Yajnavalkya and Mitakshara includes grandson. We are of opinion that the discussion relating to sons in S. 9 should be taken to relate to grandsons also. The offering of the funeral cake can be made by sons, grandsons and great-grandsons. There is therefore nothing illogical in the conclusion arrived at by the author of the Dattaka Chandrika.

We vary the decree of the lower Court by directing the commissioner to partition the ancestral estate between the plaintiff and the defendant by allotting one share to the plaintiff and four to the defendant. Costs of this appeal out of the estate.

G.P./R.K.

Decree varied.

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HEATON AND SHAH, JJ.

Emperor—Prosecutor.

v.

Dhanka Amra—Accused.

Criminal Ref. No. 8 of 1914, Decided on 10th March 1914 made by Joint Judge, Ahmedabad.

Evidence Act (1872), S. 80—Statement of accused recorded by the Magistrate of native state is inadmissible unless deposed to by recording Magistrate—Section refers to officers under S. 57 (7)—Evidence Act (1872), S. 57 (7).

Section 80, Evidence Act refers only to those officers, Judges and Magistrates, who come under Cl. 7, S. 57 of the Act, and hence the statement of an accused person recorded by a Native Magistrate in a Native State cannot be used in evidence unless the Magistrate has appeared and deposed to the statement having been given before and recorded by him.

[P 41 C 2]

Manubhai Nanabhai—for Accused.

S. S. Patker—for the Crown.

Judgment.—In this case the conclusion that we have come to is that we ought to have before us, so that we can deal with them as evidence, the statements of the two accused recorded by Mr. Dolatram Motiram, 1st Class Magistrate of Palitana State. Those statements have been admitted in evidence and as we think, wrongly admitted. They have been dealt with as if S. 80, Evidence Act, applied to them. We do not think S. 80 does apply to them, because, we think, S. 80 refers only to those officers Judges and Magistrates who come under Cl. 7, S. 57, Evidence Act, that is to say, officers whose appointments and so forth are notified in the official Gazette and of whose signatures and offices the Court will take the judicial cognizance. It is necessary, therefore, that this Magistrate should be called and examined, and we direct that the Additional Judge of Ahmedabad Sessions do take the necessary evidence in the matter.

When the Magistrate of Palitana has appeared and deposed, it would appear on the authority of the case of *Queen-Empress v. Nagla Kala* (1) that the statements themselves, that is the written papers, may be used as evidence, and when all this has been done, we shall be, and not until then shall we be in a position properly to deal with and dispose of this case.

(1) [1893] 22 Bom. 235.

The evidence, when taken, must be certified to this Court, and should be taken and certified as possible.

G.P./R.K. *Order accordingly.*

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BEAMAN AND SHAH, J.

Rasul Karim—Applicant.

v.

Pirbhai Amirbhai—Respondent.

Extra Civil Appln. No. 230 of 1913, Decided on 16th January 1914, against the order of Dist. Judge, Broach, in Appeal No. 4 of 1913.

(a) Civil P. C., (1908), O. 39, R. 2—Suit for order directing defendant to pull down erection—Order granted by lower Court on interlocutory application—This was held to be fit case for High Court's revisional powers—Civil P. C., S. 115.

Where in a suit to obtain an order directing the defendant to pull down an erection, the lower Court on an interlocutory application ordered the erection to be pulled down.

Held: that it was a proper case for the exercise of the High Court's revisional powers.

[P 42 C 1]

(b) Specific Relief Act, S. 55—(Per *Beaman, J.*)—Whether Mufassil Courts have power to issue or have jurisdiction to grant mandatory injunctions on interlocutory applications is doubtful—Proper procedure to be followed in matters of urgency stated.

Per *Beaman, J.*—It is doubtful whether in any case the mufassil Courts have the power to issue mandatory injunctions on interlocutory applications and still more whether they have any jurisdiction to grant mandatory injunctions before the hearing.

Upon grounds of general expediency the proper course when applications of this kind are made would be rather to expedite the proceedings rather than to grant an injunction and where the matter is really one of urgency as in the case of pestilent nuisances, something like the procedure in England might be followed by treating the order upon the interlocutory application as a decree in the suit.

[P 45 C 2]

G. N. Thakore—for Applicant.

G. K. Parakh—for Respondent.

Beaman, J.—I think this is a proper case for the exercise of this Court's revisional powers. The question raised is one of some general interest depending upon a principle. The manner in which the question is raised is this: The plaintiff brought a suit the object of which was to obtain an order directing the defendant to pull down an erection consisting of corrugated iron sheets which the plaintiff alleged obstructed and invaded his easement of ancient light and air. That being the nature of the suit an interlocutory application was made and acceded to by the learned

Subordinate Judge who ordered the defendant to pull down the erection he had put up, and this order was confirmed on appeal by the learned District Judge. It has always been, in my opinion, a very open question whether in strictness a mandatory injunction can properly be made on interlocutory applications. In England whatever doubts may have existed on this point may be said to have been removed by S. 25, Judicature Act, and it has long been a commonplace in the text-books that the Courts indubitably have the power to make mandatory injunctions on interlocutory motions.

An examination of the case-law upon which this dictum rests is very interesting, and it confirms my impression, speaking generally, that there can hardly be a case of a true mandatory injunction which could be given upon an interlocutory application without virtually prejudging and deciding in anticipation a part or whole of the suit according to the extent and scope of the mandatory injunction. For example, in one of the earliest cases, that of *Robinson v. Lord Byron* (1), upon which, I think, most of the succeeding cases as well as the passages in accredited text-books rely, the Lord Chancellor, Lord Thurlow, after considerable doubt and hesitation as to the appropriate language, thought that before the hearing he might issue a mandatory injunction to the defendant, Lord Byron. But the facts of that case were rather peculiar, and in truth, looking to the form the Lord Chancellor's injunction took, it would be hard to say that it really went much beyond an ordinary prohibitory injunction which of course can always be granted in such suits. The facts, as far as I remember them, were that Lord Byron had the control of large quantities of water and by means of sluices and dams he continually overflowed or starved the plaintiff's mill. The plaintiff brought a suit for an injunction restraining Lord Byron from thus playing fast and loose with the watersupply; and it was admitted on affidavits at the hearing of the interlocutory motion that the defendant was acting in this manner with the deliberate intention of extorting money from the plaintiff. Thereupon

(1) [1785] 1 Bros. O. C. 593=23 Eng. Rep. 1315.

the Lord Chencellor framed an injunction the effect of which was that Lord Byron was restrained from using his power over the water in any other manner than he had been doing prior to the suit. Now it is clear that this is a very unusual injunction and when properly analyzed its effect might be restricted to future acts, which is the effect of all true interlocutory prohibitory injunctions. But I admit that the line is drawn very fine, for practically in obeying the injunction it might be that Lord Byron would have had to open some sluices he had already closed or close some sluices he had already opened.

Now the difficulty which the learned English Judges always appear to have felt about the form of an interlocutory injunction which was intended to be mandatory is also fully exemplified in the case of *Allport v. Security Co. Ltd.* (2). There the plaintiff occupied a room in a certain building and the defendant had removed a staircase leading up to this room. The plaintiff accordingly brought a suit complaining that he was shut off from all access to his room except by a comparatively inconvenient back staircase, and asked the Court to direct the defendant to reconstruct the staircase and to refrain in future from any such interference with the plaintiff's right. The case was tried before North, J., and that very learned Judge, on an interlocutory application was thoroughly satisfied that a grievous injury had already been done to the plaintiff and needed immediate remedy. So that he granted the injunction which was asked for in what I cannot help thinking, regarding it merely as a grammatical composition, this remarkable manner,

"an injunction to go against the defendant to refrain from permitting the staircase to remain pulled down."

Now in so far as any future operation could be given to any negative form of that kind, it appears to me that the injunction was meaningless, but of course its operation was exactly the same as though the learned Judge had positively ordered defendant to rebuild the staircase. And that was prejudging and deciding the whole suit. This was virtually conceded by the learned Judge who said that although the matter was only before him on affidavits he was

perfectly satisfied that the defendant could make out no better case at the hearing. In these circumstances it certainly appears to me that there was little use in having a further hearing at all.

Then again in another very instructive case decided long before the one I have last mentioned, I mean the case of *Hervey v. Smith* (3), there was certainly a real instance of a mandatory injunction required and granted, very closely resembling the injunction with which we are dealing in this case. There stood between the parties a wall which was alleged to be a party wall containing flues for smoke to pass from the rooms in the adjoining tenements, and the defendant apparently suddenly placed tiles on the tops of the chimneys with the result that very great inconvenience was caused to the plaintiff. On an interlocutory application the Vice-Chancellor, Page Wood, held that having regard to the great inconvenience occasioned to the plaintiff, and the numerous and delicate equities involved in the case, there could be no harm in directing the defendant upon this interlocutory application immediately to remove the tiles. I think that this is really referable to a doctrine, which I believe was long prevalent in England that the issue of mandatory injunctions on interlocutory applications could most properly be made in matters of nuisance, where continuing the nuisance even up to the hearing might affect the health or life of the plaintiff. Analysis show that this doctrine is infected with the same illogicality, for the issue of the mandatory injunction presupposes the success of the plaintiff in the suit and is precipitated for the reason that deferring the remedy may be dangerous; but suppose the defendant succeeds: it is clear that the ground would be cut away from under this principle and the plaintiff would have to put up with the nuisance, however dangerous.

However that may be, there can be no question but that in this case, although the form in which the injunction was given was negative, the injunction itself was mandatory, and as I have said was in many respects much akin

(2) [1895] 72 L. T. 533=64 L. J. Ch. 491=13 R. 420.

(3) [1855] 1 K. & J. 389=69 Eng. Rep. 519=103 R. R. 141.

to the injunction with which we are now dealing, for the removal of these tiles, although a definite and completed act, was one which could have been done in a few minutes and really entailed no great expense upon the defendant.

An examination of this and many other cases which I have gone through however leaves me unshaken in the opinion that in strictness no mandatory injunction upon an interlocutory proceeding can ever be temporary. If we analyze the contents of any true mandatory injunction, where we get one relieved from all complicating details such as those which exist in *Lord Byron's* case (1), it would be found to involve the doing of a definite act, whereas, all true interlocutory prohibitory injunctions merely prevent the party enjoined from doing the act for a certain period. The latter are therefore all truly temporary while the former never can be. It is only by a loose use of language and a confusion of ideas that any true mandatory injunction compelling the performance of an act can be said to be temporary. The reason why this principle is not so easy to ascertain in *Lord Byron's* case (1) is because the scope of the injunction went considerably beyond the doing of one definite act and presupposing not only the possibility but the likelihood of a continuing set of acts of the like character in future, practically prohibited those future acts from being done. But if we take the case of *Hervey v. Smith* (3) it will be seen at once that as soon as the defendant Smith was ordered to remove the tiles although nominally they were only to be removed till the suit was heard, yet the moment the injunction was obeyed the act was done and nothing was left to do. The confusion, I think, arises out of the use of the word "temporary" in its extended sense. It sounds as though an injunction might be temporary which orders a man to remove a tile or pull down a screen, as in the present case, for a month or until the hearing of the suit, but on examination it must become clear that no element of time in that sense enters into the injunction at all, and the true distinction between these classes of injunctions then comes into relief. That distinction, I think, may be made more commonly intelligible not

by the use of such words as "permanent" and "temporary," but by the use of such words as "provisional" and "final." To give a very homely illustration, you might properly enjoin a man to refrain from eating an apple for an hour, but you cannot order a man to eat an apple for an hour, that is to say, meaning that at the end of the hour his condition is to be the same as though he had not eaten the apple. Having once eaten it the act cannot be undone, and if apples do not agree with him his digestion may be permanently disarranged. And that is the same, I believe, in the case of every true mandatory injunction. The man who is ordered to remove tiles or pull down buildings, if he obeys the injunction, may after the hearing of the suit be allowed to replace or put them up again, but that is certainly not restoring him to the condition in which he was before the injunction was issued and obeyed. And the true intent of all interlocutory, that is to say, temporary prohibitory injunctions, is one and the same, to maintain the subject-matter of the suit in status quo until the Court at the hearing is in a position to decide finally the rights between the parties. I expect that the constant reiteration of the passage in the text-books is largely due to the sweeping and unqualified dictum of Fry, L. J., in the case of *Bonner v. Great Western Railway* (4), in which that learned Lord Justice says that no doubt can be entertained as to the power of the Court to issue a mandatory injunction in a proper case upon an interlocutory application. That case was decided in 1883, ten years after the passing of the Judicature Act, and, as I have said, in that Act legislative sanction was conferred upon the old, though not very confident, opinion of the English Judges. But the object of my observations and criticism of these cases has been to emphasize a distinction which may exist in principle, and certainly does exist in language, between the provisions of the Statute law in England and in India.

If we turn to O. 39, Rr. 1 and 2, which govern all the Courts of the Mufassil in India, it will be observed that the issue of injunctions upon interlocutory applications is designedly con-

(4) [1883] 24 Ch. D. 1=48 L. T. 619=32
W. R. 190=47 J. P. 580.

fined to temporary injunctions, and, speaking for myself, I do entertain some doubt whether the Courts in India have any right to assume that in this respect they are on the same footing as the Courts in England, and have the power and a discretion to issue mandatory injunctions upon interlocutory applications. It is obvious that if this were done the discretion would have to be constantly and narrowly scrutinized, for in every case of the kind, as I believe I have shown, the issue of such a mandatory injunction practically pre-judges the suit, and there may be other practical inconveniences of a lesser degree, such as for example that by pulling down a structure, of which the plaintiff complains before suit, the Court might not be in a position to determine at the hearing whether such structure did or did not interfere with the easements which the plaintiff wished to have confirmed, or if it did interfere, then to what extent so as to be able to decide whether the remedy should be by injunction or damages.

It is true that in the present case Mr. Thakore does not put a very high value upon the screens which have been put up, or contend that pulling them down would involve the defendant in heavy expense; and Mr. Gokuldas has volunteered to undertake that any expense so incurred should be refunded to the defendant by the plaintiff if the suit is finally decided in his favour. That, of course, might meet the requirements of a particular case, but it does not really touch the principle which I am considering. And it certainly appears to me most undesirable that what is ultimately to be decided at the hearing should thus be pre-judged and relief given in anticipation, nor does the reasoning of the learned Judges below commend itself to me. They appear to think that because it is common ground that the plaintiff's windows have enjoyed light and air for fourteen years a presumption arises in his favour, and that no doubt has weighed very much with both the learned Judges below in granting in the first instance and afterwards confirming this mandatory injunction. It ought to be obvious however, though there is a singular instance of a like misapprehension in England in the case of *Bonner v.*

Great Western Railway (4) to which I have already alluded, that a party claiming easements of light and air upon an allegation of less than twenty years' enjoyment has no right at all, and therefore, if the admissions go no further back than fourteen years, no presumption can possibly arise in the plaintiff's favour. Entertaining the doubt I do, whether in any case the mufassil Courts have the power to issue mandatory injunctions on interlocutory applications it appears to me that upon grounds of general expediency the proper course where applications of that kind are made would be rather to expedite the proceedings than to grant an injunction; and where the matter is really one of urgency, as in the case of pestilent nuisances, and the Court feels that it ought to interfere at the earlier stage, something like the procedure which, I think, is not infrequently adopted in England, might be followed in this country, I mean that the order upon the interlocutory application might be treated as a decree in the suit. If that were done then the illogicality or most of it which infests every case I have examined on this point would, of course, be removed. But unless it is done there always will be this objection to the issue of any such order, that in proportion to its scope it concludes the whole or part of the case, and that merely upon affidavits and before the hearing upon proper evidence. In the particular case I feel that it might be a real hardship to the defendant to order him thus summarily to pull down his screens and wait the result of the suit before being allowed to put them up again, and for that reason, particularly in view of the considerations which influenced the learned Judges in granting and upholding this mandatory injunction, I think that this Court could properly interfere in the exercise of its extraordinary jurisdiction. I gravely doubt whether the mufassil Courts of this country have any jurisdiction to grant mandatory injunctions before the hearing. For our legislature has restricted the power of these Courts to the making of temporary injunctions only upon interlocutory motions, and I hope I have shown that no true mandatory injunction can ever be "temporary." But assuming that there was

the jurisdiction, I still think that this was a case in which no such injunction ought to have been issued, and that not only upon the particular facts but with regard to general and far-reaching principles. So that it would not be an abuse of language to say that the Court in exercise of its jurisdiction had acted, in my opinion, illegally and with material irregularity. We are, therefore, agreed that the mandatory portion of the injunction of which alone complaint has been made to us here ought to be set aside and we think that all costs of this might well be made costs in the cause.

Shah, J.—I do not desire to decide the general question argued on this application, viz. whether the Courts have power under O. 39, R. 2, to make an order restraining a defendant from committing the injury complained of which may render it necessary for him to undo what may have been done by him before the suit. There can be no doubt that the English Courts have the power to grant mandatory injunctions on interlocutory applications: see Halsbury's Laws of England, Vol. 17, para. 489. I am not sure that the Indian Courts have not similar powers under R., 2, O. 39.

But assuming without deciding that the Courts have the power to grant such temporary relief it is clear that it must be exercised with great caution and in strict conformity with the provisions of the Civil Procedure Code. In this case the mandatory injunction directing the defendant to remove the partition does not appear to me to conform to the provisions of the rule in question. Having regard to the pleadings as also to the reasons given by the lower Courts for granting a mandatory injunction I feel satisfied that there has been a material irregularity in making such an order. I therefore agree in the order proposed by my learned brother.

R.B./R.K.

Rule made absolute.

A. I. R. 1914 Bombay 46

HEATON AND SHAH, JJ.

Tuljaram Harichand—Appellant.

v.

Sitaram Narayan—Respondent.

Second Appeal No. 810 of 1913, Decided on 31st October 1913, from decision of Ag. Dist. Judge, Satara, in Appeal No. 162 of 1912.

Civil P. C. (5 of 1908), O. 5, R. 5—In mortgage suit summonses issued for final disposal — Defendant on date of hearing denying execution of deed and receipt of consideration—Suit dismissed on account of parties not being ready with evidence — Summons for settlement of issue held necessary to enable parties to produce evidence.

In a mortgage case summonses were issued for final disposal and not for settlement of issues. On the date of hearing the defendant appeared and denied the execution of the mortgage-deed and the receipt of consideration. As the plaintiff was not ready with his witnesses, the Court dismissed the suit.

Held: that in such cases a Court should issue summons for settlement of issues and give the parties an opportunity to produce evidence on the issues settled. [P 47 C 1]

D. G. Dalvi—for Appellant.

A. V. Lele—for Respondent.

Heaton, J.—In this case my opinion is that there has been a miscarriage of justice owing to a want of understanding of the intention of the Procedure Code.

A suit No. 685 was filed in 1910. Up to 13th April 1912 a summons had not been served on the defendant. On that date the present plaintiff applied to have his name entered in the place of his deceased father who was the original plaintiff. That application was granted, and 1st June was fixed for the final disposal of the suit. A notice was issued to the defendant to appear on that day with his witnesses. On 1st June the plaintiff appeared and the defendant also appeared and put in a written statement, but neither party produced any witnesses. The suit was a mortgage suit, and in his written statement the defendant denied that he had executed the mortgage deed or had incurred the debt sued for. This therefore was eminently a case in which all the issues arising out of the contentions should have been framed and moreover one in which it was very desirable to examine the parties before framing issues, and yet the case was disposed of as if it had been correctly fixed for final disposal at the first hearing and as if it could be

properly disposed of at once, although the contentions of the parties were as I have mentioned and although the scheme of the Code requires, in cases of such a nature, that the parties should have the opportunity to produce evidence relevant to issues which are framed after ascertaining exactly those matters as to which the parties were in dispute. In disposing of the suit in the way which was adopted, I think, as I have said at first that there was a miscarriage of justice, and a miscarriage of justice due to an absolute misappreciation of the meaning and intention of the Code of Civil Procedure. I would invite the attention of the Subordinate Judge and the District Judge to para. 5 of the Introduction to the Manual of Circulars of this Court and also to R. 5, O. 5, Civil P. C. It is for the Court to determine at the time of issuing the summons whether it should be for the settlement of issues only or for the final disposal of the suit. And if our Courts are in the habit of issuing summonses for final disposal in mortgage suits, they make a mistake at the very beginning. And if they further proceed to treat these suits as if the summons for final disposal were properly issued, then they must in many cases, as in this, encourage not the doing but the failure of justice. For these reasons I consider that the order in appeal and the order of the first Court are alike wrong, that the case has been wrongly decided without a fair trial, and I would direct that the case should be remanded to the first Court for the framing of issues and a trial according to law.

I would add this: The suit of 1910 which was set down for final disposal was an old suit and it is of undoubted importance that suits should not be allowed to remain undisposed of for long periods; but although the fact that a suit is one of long standing is an excellent reason for fixing an early date for its disposal, it is no reason at all why it should be disposed of in a manner not contemplated by our Code. The order is that the decrees of both the Courts are set aside and the case is remanded for proper issues to be framed and to be tried in accordance with law. Costs to abide the result.

Shah, J.—I am of the same opinion. Having regard to the nature of the suit,

the summons, in my opinion, under R. 5, O. 5, should have been only for the settlement of issues and not for the final disposal of the suit. But when the written statement was filed in this case on 1st June and several contentions were raised by the defendant, the trial Courts should have under O. 15, R. 4, after framing and recording issues, adjourned the suit for the production of such evidence as may be necessary for the decision upon such issues. I agree generally with the observations of my learned brother as regards the desirability of issuing summonses for final disposal of suits only in simple cases. In a case in which the summons may have issued for final disposal, if, after the written statement is filed, the suit is found to involve issues of a less simple character than might have been anticipated at the outset, it is desirable in the interests of justice that the discretion given to the Court under R. 4, O. 15, should be so exercised as to ensure a fair trial and not to deny in effect the trial to the parties.

G.P./R.K.

Decree reversed.

A. I. R. 1914 Bombay 47

BEAMAN AND MACLEOD, JJ.

Pirsab Kasimsab Itagi—Appellant.

v.

Gurappa Basappa Kadigi—Respondent.

Second Appeal No. 791 of 1912, Decided on 7th October 1913, against District Judge, Dharwar, in Appeal No. 79 of 1911.

(a) Limitation Act (1908), Art. 141—Deed executed by adoptive parents stating that adopted boy was to get property of adopting parents upon their death—After father's death boy driven out by mother who remained in possession for more than 12 years—Suit by son to challenge alienation by widow—Deed held to require registration—Widow's position was not adverse to son—Adverse possession.

The adoptive father and mother of a boy shortly after the actual adoption executed a deed stating that the adopting parents possessed certain property and after their death the adopted son was to obtain the whole of it. After the death of the father, the adopted son was driven out of the house by the mother who remained in possession for more than twelve years till her death. In a suit by the son to challenge an alienation by the widow.

Held: that whatever benefit was to be reserved to the widow, under the deed, must have been either by way of gift, from her husband or by way of contract with the minor son, and in any case there was created in the

widow an interest in the immovable property which she otherwise would not have possessed, and could not have possessed, and as that interest exceeded in value Rs. 100 the instrument required registration.

Held further: that the possession by the widow was not adverse to the son. [P 49 C 2]

(b) **Adverse Possession**—In no circumstances can person set out to acquire limited estate within larger estate by adverse possession.

There can be no circumstances in which a person can set out consciously to acquire a limited estate within a larger estate by adverse possession, the natural legal consequence of which would be to confer the latter, i.e., full ownership upon him. [P 50 C 2]

(c) **Civil P. C. (1908), S. 100** — (Per *Macleod, J.*)—Admission or pleadings showing that case is barred—Point of limitation on ground of adverse possession can in such cases be raised in second appeal—Adverse possession.

Per *Macleod, J.*—There may be cases where admissions on pleadings clearly show that the plaintiff's claim is barred under the Limitation Act, but it is very rarely that such admissions appear, and it is only in such cases that the point of limitation on the ground of adverse possession can be raised in second appeal.

[P 51 C 2]

S. V. Palekar—for Appellant.

N. G. Gokhale—for Respondent.

Beaman, J.—In this case the plaintiff has sued to have certain leases, executed by his adoptive mother Rachava to the defendants, set aside. The material facts are that in January 1893 or thereabouts the husband of the lessor and the lessor being then man and wife without issue, adopted the plaintiff with the consent of his natural father, and apparently shortly after the actual adoption executed a writing, Ex. 30 in the case. That writing states that the adopting parents possessed certain property, and after their death the adopted son is to obtain the whole of it. In 1894 the adoptive father Basappa died. We have not unfortunately the exact date. According to the plaintiff's own statement in his plaint, within two or three months of the death of his adoptive father Basappa his adoptive mother Rachava drove him out of the house, and from that time until her death in 1907 the plaintiff resided with his natural father or at any rate never returned to the home of his adoptive mother. In 1902 the lessor executed these two leases to the defendants. It was also in 1902 that the plaintiff attained his majority. In 1907 the lessor, that is to say, the widow, the adoptive mother of the plaintiff, died, and within

three years of her death the plaintiff brought this suit to have the leases set aside as being alienations invalid beyond the lifetime of the widow with the life-estate. Upon these averments the lower Courts held that the widow was given a life-estate under Ex. 30 and therefore that the plaintiff's suit was within time. We have felt ourselves unable to admit Ex. 30 in evidence for want of registration. Once that paper is out of the case the position is somewhat changed. A very neat point of limitation was then very neatly put to us by Mr. Palekar and it arises in this way: he contends that in law the effect of the plaintiff's adoption was to make him the sole heir of his father, the widow being entitled to nothing more than maintenance. But since in 1894 she drove the plaintiff out, and thenceforward managed the property herself, her possession from that day unto her death in 1907 must be considered adverse to the plaintiff: see the decision of the Privy Council in *Bajrangi Singh v. Manokarnika Bakhsh Singh* (1). Inasmuch as the plaintiff attained his majority in 1902, and adverse possession started in 1894, it is clear that the plaintiff would have been completely time barred by the end of the year 1906 at the latest. Therefore he is not now in a position to question any of the acts done by his adoptive mother during that period. It is true that he is still her heir and would therefore retake the property, but would not be in a position to challenge any of the alienations made by her as of her absolute estate. This point of limitation does not appear to have occurred to any of the pleaders or learned Judges concerned with the trial up to the conclusion of the proceedings in the Court of first appeal. The only bar of limitation relied on by the defendants in the first Court appears to have been set up under Art. 91, Sch. 2, Lim. Act, and that would arise in this way. The leases having been made in 1902 and presumably to the plaintiff's knowledge, if he believed them to be in derogation of his rights as heir-expectant, he ought to have brought the suit within three years of the date of the leases or after

(1) [1908] 20 All. 1=35 I. A. 1=5 A. L. J. 1=9 Bom. L. R. 1348=12 C. W. N. 74=6 C. L. J. 766=83 M. L. T. 1=17 M. L. J. 605 (P.C.).

attaining his majority, whichever gave him most time. That period would have ended at the latest at the close of the year 1905. It will be observed that for the purposes of this argument I have stated that the plaintiff was presumed to have known of the leases. The point however was early dropped and has not been pressed before us. At one time it appeared as though there might have been something in it, but having regard to the fact that actual evidence would have been required to show that the plaintiff had in fact known of the leases more than three years before suit, and no evidence of that kind being apparently available, this would clearly be a matter into which we could not go in second appeal.

I shall now proceed to deal in some detail with the new point of limitation taken by Mr. Palekar. But, first, I must explain the reasons for which we have excluded Ex. 30 from consideration. Regarded from the point of view of the adoptive father we find it impossible to say that this paper could be his will, because rightly analyzed it appears to reserve a life-interest to himself, and after himself to his widow, before giving the remainder absolutely to the plaintiff, and any instrument which confers or reserves a life-estate to the maker could hardly in strictness, we think, be called a will. Nor can it be said to be a gift in presenti to the widow. Even were it so it would certainly require registration, so that in any view, except that of contract, it may be doubted whether this instrument creates any rights at all to which legal effect could be given. Now there are many cases of a like nature in which similar writings appear to have been treated by the Courts in India, and even by their Lordships of the Privy Council as contracts or quasi contracts between the adoptive widow of the one part and the natural father of the minor adopted of the other. All those are cases of adoptions by widows, and this is a different case because here the true adopter was of course the father, the widow having no right whatever during his life-time to prevent him adopting if he chose to do so. Nevertheless, even in the cases I have adverted to analysis will, I think, reveal many difficulties. Speaking for myself I have always found

it most difficult to refer these instruments imposing conditions apparently upon an adopted minor logically to any true category of contract. If real contract, then it must be a contract between the natural father of the minor son and the adopted widow, the natural father representing his minor son and the resultant contract supposed to be for the benefit of the minor and on that account held to be binding upon him. But I think the very furthest that any such arrangement could be taken under the law of contract would be that it would be open to the minor on attaining majority either to ratify or repudiate, so that, if contracts at all, these conditions annexed to adoptions would be contracts only complete when ratified by the minor after attaining majority. But if the minor desired to ratify any such contract on attaining majority, the pre-existing contract would obviously be nugatory, since it would clearly be open to him as an adult to confer upon his adoptive mother a life-estate or, in other words, to abrogate so much of his full rights if he chose to do so. Nor is it easy to understand upon what ground the taking of a son in adoption can be regarded as consideration, and when the matter is referred, as it usually is, to a future and expectant ratification, the invalidity of the whole argument becomes more apparent since, while it is open to the minor to resile from his share of the contract, it is quite impossible for the widow to resile from hers. An adoption once made cannot be unmade. So that it would appear that these instruments of condition, sometime precedent to sometimes contemporaneous with and sometimes subsequent to an adoption can hardly be regarded as true contracts. Nevertheless, when contemporaneous with or immediately precedent to, and particularly when embodied in a deed of adoption, there can be no doubt, I think now, but that the law has agreed to accept and validate them. They then appear to stand upon some footing entirely peculiar to themselves. Thus the widow is said to be in law entitled to make any reasonable conditions at the time of adoption, such as reserving to herself a life-estate, although that is utterly opposed to the resultant legal effect of an adoption upon the rights of the parties, and having done

so, that those conditions must be enforced as binding upon the adopted son. So that here, had the adoption been made by the widow and this term incorporated in the deed of adoption or in any writing immediately precedent to or contemporaneous with it, we should have felt it hard to say that it was not on all fours with similar writings which have been admitted and acted upon by the highest judicial authority without the need of registration. But having regard to the fact that the estate to be dealt with was at the time of the adoption not the widow's estate at all, it is clear that she at least had no power to make any reservations for her own benefit and in her own interest. Thus it comes out at last that whatever benefit was to be reserved to the widow, under this adoption deed, must have been either by way of gift from her husband or by way of contract with the minor, and in any case quite clearly there was created in the widow an interest in the immovable property which she otherwise would not have possessed and could not have possessed, and that interest exceeded in value Rs. 100 and was created by the instrument Ex. 30. I, therefore, think that that instrument requires registration and not having been registered, is inadmissible in evidence for any purpose whatever affecting the property now in suit.

That leaves me now face to face with the point of limitation raised by Mr. Palekar on such facts as remain after the elimination of the explanatory paper, Ex. 30, and it appears to me that his very clear and cogent argument would be conclusive but for one possible reply, and that reply, I think, in turn is equally conclusive. In the first place, I must not omit to notice that contentions of this kind taken for the first time in second appeal are usually viewed with considerable disfavour. It may very fairly be doubted whether a point of limitation like this, involving as it does the character of the widow's possession, does not really raise a question of fact which can only be answered upon evidence, and were that necessary to be taken, it is quite clear that we sitting in second appeal should be precluded at this stage from reopening the inquiry at any point and inviting or

discussing any further evidence. Mr. Palekar replies, however, that no evidence whatever is needed, that his point is a pure point of law arising upon the materials before the Court, not one of which is in dispute.

At first I was disposed to think that the widow's possession, from 1894 to 1902, when the plaintiff attained his majority, might be referred and, therefore, ought to be referred to her position as his natural guardian. But in view of the plaintiff's admission that she drove him from the house in 1894 since which time he has never resided with her, it certainly does appear to me to be sufficient in itself to negative the ascription of her possession to any such character as that of natural guardian. Still, it may be contended that the character of the possession remains undetermined in the absence of all evidence. Speaking here entirely for myself, I should be inclined to think that the admission of the plaintiff, were there nothing else in the case, would sufficiently indicate the character of the widow's possession, and if that were so, then all the legal consequences upon which Mr. Palekar insists would flow from that possession and the plaintiff would indubitably, in my opinion, have been completely time-barred at the close of the year 1906. Nor do I think that conclusion could be affected by the suggestion that all that the widow obtained by her adverse possession was a life-estate. For, after giving my most careful consideration to that point I am utterly unable to understand or conceive any circumstances in which a widow could possibly acquire by adverse possession a merely limited estate of that kind. Adverse possession of the property would certainly give her absolute ownership, and absolute ownership being larger would of course include the lesser estate. I repeat I cannot conceive any circumstances in which a person could set out consciously to acquire a limited within a larger estate by adverse possession, the natural legal consequences of which would be to confer the latter, i. e., full ownership upon him. So that I do not think that the respondents derive any advantage from that line of argument.

But I do not think that, although we have been obliged to exclude Ex. 30 en-

tirely from our minds as proof of any consideration annexed to the adoption of the plaintiff I cannot ignore the very plain understanding which existed between the plaintiff and his mother as evidenced throughout the whole course of this trial in both the Courts below. Looking to the pleadings, looking to the contentions of the defendants themselves, there can be no doubt that the real truth is this: that the plaintiff believed that his adoptive mother was entitled to a life-estate under Ex. 30. It is equally clear that the defendants dealt with her in the belief that she had a life-estate and I think it is quite as clear that the widow herself was really managing the property in the like belief namely that she had obtained the estate under Ex. 30. Now if that was the true belief of the plaintiff and his adoptive mother, the widow, it would follow obviously that her possession so long as she lived would not be adverse to the plaintiff at any period, but merely permissive. That is to say, if the plaintiff honestly believed, though wrongly, that she was entitled to remain in possession for life and if she shared that belief and so remained in possession while he took no steps to disturb her, the principal ingredient in Mr. Palekar's case would be wanting, namely, the intention to hold adversely in order to acquire an absolute estate, and it is upon that basis that I think the relief prayed for by the plaintiff in this appeal ought to be granted. For it follows that if I am so far right the plaintiff allowed the widow a life-estate and at the conclusion thereof in the year 1907 no question of limitation could arise either upon the old ground under Art. 91 or upon the new ground so ingeniously taken and, in my opinion, so admirably argued by Mr. Palekar. I think too that the merits and justice of the case point the same way.

In my opinion therefore for the reasons I have stated the judgment of the Court below though arrived at by a different process of reasoning is substantially right and this appeal ought to be dismissed with all costs.

Macleod, J.—I agree with the conclusion arrived at by my brother Beaman but I would like to add a few words on the point raised by Mr. Pale-

kar that the plaintiff's claim is time barred on the ground that the possession of the widow from 1904 was adverse to him. There may be cases where admissions on the pleadings clearly show that the plaintiff's claim is barred under the Limitation Act, but it is very rarely that such admissions appear and it is only in such cases that the point of limitation on the ground of adverse possession could be raised in second appeal. In this case there is only the allegation in the plaint that the widow some time after her husband's death had treated the plaintiff badly and driven him out of the house and that the plaintiff did not thereafter return to live with the widow his adoptive mother. That is not sufficient by itself to establish a case of adverse possession by the widow if only because there is no date from which adverse possession is stated to have begun and it would be necessary to adduce other evidence to show not only that the widow possessed the property adversely to the interest of the minor adopted son but also when such adverse possession began. As the plaint stands it is quite possible that although the widow did not wish the minor to live with her, still she was willing to recognize his rights and was willing to manage the property in his interest or at the most was desirous of enjoying the life-estate which was given her under the adoption deed, while recognizing that the adopted son was entitled to the property after her death. So that before the Court could hold that the widow held adversely to the son evidence would certainly have to be brought to show precisely that such possession was adverse. There is no evidence in this case as the point was not even raised in either of the Courts below and therefore I should dispose of Mr. Palekar's contention on that ground viz. that there is no evidence before the Court which could induce it to hold that the widow's possession was adverse.

G.P./R.K.

Decree confirmed.

A. I. R. 1914 Bombay 52

BEAMAN, J.

Yeshwant Vishnoo—Plaintiff.

v.

Keshavrao Bhaiji and *others*—Defendants.Original Civil Suit No. 74 of 1913,
Decided on 30th January 1914.**(a) Landlord and Tenant—Fazendari tenure—Fazendars held upon perpetual tenure subject to nominal payment of rents to Government—They might sublet it on any conditions.**

All true fazendars are persons holding plots of land upon perpetual tenure, subject only to the payment of nominal rents to the Government. Any true fazendar might deal with the land he holds as he pleases and might sublet it on any conditions he likes, and it would not necessarily follow that any element of the original tenure was introduced into the sub-contracts. [P 53 C 1]

(b) Lease—Construction—Fazendari lease taken from fazendar—Character of lease does not change.

Where a tenant takes from a fazendar and in the lease it is expressed that the tenant takes on fazendari tenure, and the terms of the lease are not in themselves inconsistent with such an expression, the term fazendar must be read between the parties in the sense in which it has always been understood to denote the character of the tenure of the true fazendar as between himself and the Government, that is to say, a permanent tenure. [P 53 C 2]

Wadia and Desai—for Plaintiff.*Jinnah and Strangman*—for Defendants.

Judgment.—In this case I think the defendants must succeed on two very substantial grounds. The plaintiff is suing as a fazendar to evict the defendants. The defendants claim to be permanent tenants. It is unnecessary to trace the respective title of the parties since there is no dispute but that the plaintiff derives from the original fazendar and the defendants from the original lessee Manik Vithal. I am much indebted to counsel for taking me back to the original sources of the law in this Presidency upon fazendari tenure, and thus giving me an opportunity of analyzing the sources of that law and tracing the confusion of thought and language which appears ever since to have characterized the common Bar opinion upon this topic.

The first ground upon which I shall place my decision is that upon a mere construction of the lease Ex. B in the case, dated 22nd February 1860, I have no doubt whatever but that it is a permanent lease. The lessee takes on

what is called fazendari tenure, and he takes expressly for building purposes; and it is also expressed that his tenancy is to be co-extensive with the right of the true fazendar over the entire part. Now, it is by the use in leases of this kind of such words as "fazendari tenure" that the confusion of thought, to which I have alluded, becomes most conspicuous. I think there cannot be the least doubt but that the matter is in itself essentially simple and would never have gathered so much mystery about it, but that all true fazendars, as far as I know, have never been called upon or if they have been called upon have never been able to adduce paper title explanatory of their status. It is to be remembered when I say this, that in my opinion, every one originally paying tax and pension was a true fazendar. This dates from Aungier's Convention in 1672.

The effect of it was to confirm all fazendars found in possession of land outside the fort in perpetual possession upon payment of a tax or pension. "Pension" here means royalty not quit-rent and those who paid pension only were in respect of their lands virtually free holders, acknowledging by the payment of this pension royalty to the Suzerain Power. Some fazendars appear to have paid both tax and pension and some tax only or pension only. Thus it becomes perfectly clear that, historically and in its inception, "fazendari tenure" is to be referred to the relations existing between the original fazendars and the Government. But even in the Bombay Gazetteer, as well as in common parlance, "fazendari tenure" appears usually to be understood as confined to the relations subsisting between the true fazendars and their tenants. This I believe to be historically as well as theoretically inaccurate, but I think it is more than probable that these latter relations were in the beginning governed much more by usage than by contract, and when governed by usage, assumed very peculiar forms, to which legal effect was sought to be given in the dissentient judgment of Yardley, J., in *Doe dem, Dorabji Dadi Santuk v. Bishop of Bombay* (1). There is nothing however that I can see in theory to prevent

(1) [1848] Perry's O. C. 498 = 3 Ind. Dec. (O. S.) 456.

a true fazendar sub-letting his land on ordinary principles of contract, and wherever that is done and those principles are discoverable in the document, the resultant relations are purely contractual and not to be determined by inquiry into usage. But still it is quite obvious that all true fazendars are persons holding plots of land, probably acquired before the advent of the British Government, upon perpetual tenure subject only to the payment of a nominal rent to the Government. Every such true fazendar might, of course, deal with the land, he so held, as he pleased and might sub-let it just as any other owner of land or buildings might sub-let his property, and it would not necessarily follow that any element of the original tenure was introduced into those sub-contracts. This probably explains the dictum of Farran, J., in an unreported judgment in Suit No. 262 of 1883, *Purmanandas Jivandas v. Arda-seer Faramji*, in which that learned Judge says :

"My experience is that it is used with reference to tenants holding under a private landlord to indicate sometimes an indefeasible right to hold in perpetuity on payment of a small quit or ground rent and sometimes any kind of tenure agreed upon between the parties."

It appears to me however that, expressed as it is, that sentence throws but little light, if any, upon the subject. If the word "fazendari" indicates anything at all, that must be with reference to its own peculiar and special connotation, and it seems to me erroneous to say that it could indicate any kind of tenure agreed to between the parties. There may be instances (and the case before the learned Judge was one of them) in which the other terms in the sub-contract show clearly that the introduction of the term "fazendari" is deprived of all its special connotation, and is therefore either superfluous to or contradictory of the real intentions of the parties. Thus to talk of a tenant taking from a fazendar on Fazendari tenure from month to month with other terms, showing that what was intended was purely a monthly tenancy, would mean no more than that the term "fazendari" has been ignorantly used and was in that connexion meaningless. In all such cases the explanation of the introduction of this

word is probably referable to the fact that the lessor is himself a fazendar and might have wished to insist upon reproducing that character in his own interest in the sub-contract. However that may be, a very little reflection will show that there cannot be two fazendars of the same property at the same time, and, therefore, it is only by the actual assignment of his fazendari rights (and that is a case with which I am not now concerned) that a true fazendar ceases to be a true fazendar and his assignee assumes that character in his stead. But there is another sense in which the use of the term "fazendari" in these sub-contracts may have a very distinct significance for purposes of construction and interpretation ; that is to say, where a tenant takes from a fazendar, and in the lease it is expressed that the tenant takes on fazendari tenure, and the terms of the lease are not in themselves inconsistent with such an expression, I think it may safely be assumed that the real intention of the parties was that the fazendar meant to transfer to the tenant upon the agreed rent exactly the same relations, as between them, in which he in turn as fazendar stands to the Government, that is to say, that in all these sub-contracts where the fazendar designedly gives them upon fazendari tenure, the term "fazendari" must be read between the parties in the sense in which it has always been understood to denote the character of the tenure of the true fazendar as between himself and the Government, that is to say, a permanent tenure. I have not the very least doubt in my own mind that that has, during recent years at any rate been the understanding between the parties to leases of this kind in the town and island of Bombay when a fazendar sub-lets on fazendari tenure, unless the other provisions of the lease make it quite clear that there was a different and contradictory intention. So that if in every case of a lease by a fazendar to one who was not a fazendar the latter had been described in the lease as a sub-fazendar, virtually the whole confusion of thought, with which this topic has been clouded in our law books, would, in my opinion, be at once dispelled. There is however one pos-

sible alternative, viz. that when the fazendar sub-let on "fazendari tenure" he meant to import the very peculiar incidents which custom and usage may have attached in olden times to the relations existing between such sub-tenants and the fazendar. But I think it would be too late now, especially in view of Sir Erskine Perry's judgment, to re-open inquiries into what such ancient custom and usage may have been whenever we find the words "fazendari tenure" in these sub-leases.

Applying that reasoning to the terms of the present lease it is quite clear that there is nothing in it contradictory to the natural use and meaning of the words "fazendari tenure" which it contains. The landlord Gopal Dinaji held the land in relation to the Government as a fazendar, and therefore in perpetuity. He gives a portion of it to Manik Vithal on "fazendari tenure", that is to say, as between himself and Manik Vithal, to the latter in perpetuity. I therefore have felt no difficulty whatever in construing the document of 1860 as a lease in perpetuity. I do not now dwell upon a question raised at one part of the trial by counsel for the defendant as to the genuineness of that document. It is more than thirty years old and it comes from proper custody. I see no reason whatever to doubt that it is a genuine document, and I may add that I think the defendant's position would have been very much weaker without it than it now is with it; for, if that document were held to be a forgery, then we should have to look for the origin of the tenancy elsewhere and might have to invoke the language of Ex. A in the case, which is an agreement of the year 1859, between the same parties. There can, of course, be no doubt (for this is common ground) but that in the year 1860 there was a subsequent agreement of 22nd February; but if Ex. B be not that agreement then its terms are lost for ever, and in investigating the origin of the tenancy, in order to throw light upon its true character, I do not see how the Court could ignore Ex. A. I will not pursue that topic any further, for, as I have said, I do not think that there is any sufficient reason to doubt the genuineness of Ex. B, the lease of 22nd February 1860.

The second ground, upon which I think the defendant has an equally solid defence, is that of limitation. As far back as 1871 the plaintiff gave the defendant peremptory notice to quit on the ground that the tenure was an ordinary tenancy from year to year. The defendant replied virtually denying in toto the plaintiff's title. There the denial went further than probably the defendant would wish to carry it now, for he denies that to his knowledge the plaintiff was a fazendar of the land, or had any right of interference with his (the defendant's) occupation of it. In this case, however, I take it to be common ground that the plaintiff is and always has been the true fazendar of the entire part, of which the land in dispute forms a portion. Nevertheless it appears to me quite clear that the defendant at the same time repudiated, and intended to repudiate, the plaintiff's right to treat him as a tenant from year to year; that is to say, he asserted his right to a permanent tenancy, if not in the actual notice, at any rate by his subsequent conduct, of which abundant evidence is forthcoming in the year 1901. Between 1875 and 1901, there is no evidence before the Court to show that the defendant paid to the plaintiff any rent whatever. It has been contended on behalf of the defendant that not one anna of rent was paid for the whole of that period. However that may be the defendant has never repudiated his liability to pay the quit-rent or ground rent of Rs. 9 a year which his predecessor-in-title Manik Vithal agreed to pay to the fazendar under the lease of 1860. So that, when the plaintiff sued the defendant in 1901, the defendant so far admitted his title as to consent to pay him ground rent, on condition that it was described as fazendari, at the old rate of Rs. 9 per annum, stipulated for in the lease of 1860. I apprehend therefore that there can be no doubt but that the defendant has established a prescriptive right to perpetual tenure of the land upon the terms originally agreed upon between Gopal Danaji and Manik Vithal in 1860.

I will not pause upon the third ground of defence, which was that by the agreement of 1901, whatever may be said about the events which had previously happened, the plaintiff accepted the

defendant as his permanent tenant. I am by no means sure that that would be a very solid ground.

But upon the two points I have dealt with I think that the defendant has well established that the plaintiff's suit for ejectment fails.

There is a prayer for three years' arrears of rent, and that the defendant has never objected to pay. That amount must therefore be decreed to the plaintiff, but, of course, that will not affect the order for costs, which will be the same as though the suit had in all respects been dismissed. Decree for the plaintiff for Rs. 27; but the plaintiffs should pay all the costs of this suit.

G.P./R.K.

Order accordingly.

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SCOTT, C. J., AND BACHELOR, J.

Chandrashankar Pranshankar — Appellant.

v.

Bai Magan — Respondent.

First Appeal No. 254 of 1912, Decided on 28th January 1914, against decision of 1st Cl. Sub-Judge, Surat in Civil Suit No. 15 of 1910.

(a) Registration Act (1877), S. 17 (e)—Goods, properties and family assets handed over to trustees by deed for benefit of creditor—Proceeds of trust properties to be utilized to pay off creditors—Deed held to be composition deed not requiring registration under S. 17 (e).

B finding himself unable to carry on the family business further and settle its claims and debts, made over by deed to certain trustees the whole of the goods and properties and assets belonging to the family for the benefit of the creditors. The deed also provided on behalf of the creditor that after all the goods and properties are made over to the trustees, the whole of their claims should be understood to have been written off and the document might be used as a release passed by them in their behalf. The trustees were to devote the proceeds of the trust properties to the payment of the creditors in proportion to their respective claims.

Held: that the deed was a composition deed within the meaning of S. 17 (e) Registration Act and it did not require registration.

[P 55 C 2; P 56 C 1]

(b) Registration Act (1877), S. 17 (e)—“Composition deed” in S. 17 applies to transfer of immovable property and not to mere agreement to take fractional payment in settlement of claims.

It would be a very extraordinary thing if the legislature intended that the term “composition deed” in the Registration Act should mean something else than the same term in the Stamp Act, and the inclusion of the term in

S. 17 (e) Registration Act, shows that it was intended to apply to a transfer of immovable property and not to a mere agreement to take fractional payment of money in settlement of claims.

[P 57 C 1]

Strangman and D. A. Khare—for Appellants.

Inverarity, Weldon and N. K. Mehta—for Respondents.

Scott, C. J.—This suit was filed by the plaintiffs to obtain possession of a certain dwelling house according to the terms of a deed executed on 21st March 1903 by Bhaidas Rajaram for himself and members of his family. By that document it was recited that it had been resolved at a meeting of creditors that if creditors of the family firm represented by Bhaidas to the extent of Rs. 1,22,000 out of the total number of creditors claiming Rs. 1,61,800, should sign the deed before midnight on 5th March 1903, Bhaidas should make over to the trustees all the assets of the family specified in Sch. B, subject to a special condition regarding the family houses at Kelapith, namely that the trustee should allow the family to live therein up to 20th October 1903 in the same manner as it had been living there after getting a lease passed by Bhaidas and that thereafter the family should take the house and make over the same forthwith into the possession of the trustees. By Cl. 9 it was stated that Bhaidas having made over the whole of the trust properties and assets belonging to the family for the benefit of the creditors the family was reduced to a destitute condition and therefore the creditors passed a resolution to the effect that they should be allowed to occupy the dwelling house as aforesaid and that the trustees should pay an allowance of Rs. 40 a month to Bhaidas up to the same date, namely 20th October and the creditors coming in under the deed agreed that after all the goods and properties had been made over to the trustees no other claim whatever with regard to the amount due to them should remain outstanding against Bhaidas and the minor members of his family, but the whole claim should be understood to be written off against them and Bhaidas and the minors were to make use of the deed as a release passed by them on their behalf, and by subsequent clauses it was provided that the trustees were to manage

the properties for the benefit of all the creditors interested, and the money realized from time to time were to be distributed amongst such creditors in proportion to their claims. The period during which the occupation of the dwelling house was permitted to Bhaidas and his family has long since expired, but a notice to quit having been served upon them they refused to comply with it and the present suit was therefore instituted to eject them.

The deed was not registered and objection was taken at the hearing that it was inoperative in respect of the immovable properties mentioned in Sch. B, and that therefore the title of the plaintiffs to the house in question was not established.

If the document is a composition deed within the meaning of the Registration Act it does not require registration: see S. 17, Cl. (e). This very document has twice come before the High Court in previous litigation on one occasion before a Bench consisting of myself and Knight J., and on another occasion before a Bench consisting of Sir Narayan Chandavarkar and my present colleague Batchelor J. In the first case the deed was held to have passed the property to the trustees so as to defeat an attaching creditor who attached subsequent to the execution of the deed, and in the judgment the deed is referred to as a trust and composition deed. In the second case the trustees sought to recover rent from the tenants of certain immovable property mentioned in the schedule to the deed, but it was held that the document was compulsorily registrable, and not having been registered it could not be admitted in evidence. The Court there said:

"There is nothing whatever in the language of the deed to show that there was any composition, any settlement with the creditors that the debtor should pay less than he owed to them and that they agreed to accept that composition. The essential test of a composition deed is that there ought to be a compounding of debts due. Of that there is no trace whatever so far as the language of this document is concerned." *Sheikh Adam Aasanali v. Chandrashankar* (1).

It does not appear from the record which we have examined that any translation of the deed was supplied to the Court. The Court's opinion

appears to have been based upon *Reg. v. Cooban* (2) where the question was whether a *cessio honorum* for the benefit of creditors by a document which incorporated a release by the creditors was a composition deed within the meaning of certain municipal rules so as to disqualify the debtor from election to a Municipal Office.

In the first case disposed of by myself and Knight J., it was not disputed that the deed now before us was a composition deed. In the second case though it was disputed, the Court was not referred to a definition of the term composition deed which is to be found in the Acts of the Indian Legislature. That definition we have now been referred to and much reliance is placed upon it. It is the definition which has been found in all the general Stamp Acts of the Government of India from 1860 up to the present time. It is now to be found in Art. 22, Sch. 1, Act 2, 1899, and it runs as follows:

"Composition deed, that is to say any instrument executed by a debtor whereby he conveys his property for the benefit of his creditors, or whereby payment of a composition or dividend on their debts is secured to the creditors, or whereby provision is made for the continuance of the debtor's business, under the supervision of inspectors or under letters of license for the benefit of his creditors."

That definition covers three classes of instruments (1) an assignment for the benefit of creditors; (2) an agreement whereby payment of a composition or dividend is secured to the creditors; (3) an inspectorship deed for the purpose of working the debtor's business for the benefit of his creditors. It is not disputed that the deed now before us falls under the first class, and it is contended on behalf of the appellants that it also falls under the second class in that the creditors compound by giving a release for their debts in consideration of the assignment of property the proceeds of which are to be distributed rateably among them, whether or not such proceeds are more or less than the amount of their claims; and it is argued that the Stamp Act is a statute in *pari materia* with the Registration Act and that the definition contained therein should be used for the purpose of interpreting S. 17 (e), Registration Act.

(1) [1912] 15 I. C. 850.

(2) [1886] 15 Q. B. D. 269.

Now the exemption of composition deeds from the compulsory provisions of the Registration Act dates from the Registration Act of 1866 and has been continued through all subsequent Registration Acts up to the present time. The question, therefore, is whether the term "composition deed" was either in ordinary parlance or in the understanding of lawyers limited so as to exclude an assignment in trust for the benefit of creditors, the creditors being parties and releasing their claims. A reference to Murray's Dictionary will show that in ordinary parlance a compounding or composition of claims does not necessarily exclude a general agreement for settlement of debts, although no exact sum may be arrived at as the amount of the settlement, and the case of *Bamanji Manikji v. Nacroji Palanji* (3) shows that the Chief Justice thought that the agreement whereby the property of the trade was assigned to trustees for the benefit of the creditors signing the trust-deed, was a composition-deed. Why then should it be assumed that the legislature in enacting the Registration Act of 1866 intended that the term should have some more restricted signification? It appears to me that the definition in the Stamp Act may be taken as an indication that the legislature had no such intention. The Stamp Act may not be strictly speaking in pari materia with the Registration Act, but a lawyer preparing a deed such as we have here for an insolvent client or for his creditors would have first to see what stamp was required upon the document and for that purpose would have to look at the definitions in the Stamp Act and after having got the document duly stamped would have to consider whether it required registration. It would be a very extraordinary thing if the legislature intended that the term "composition deed" in the Registration Act should mean something else than the same term in the Stamp Act and the inclusion of the term in S. 17, Registration Act shows it was intended to apply to a transfer of immovable property and not to a mere agreement to take fractional payment of money in settlement of claims. The decision of this Court in *Sheikh Adam Hasanali v. Chandrashankar* (1) states

(3) [1862-65] 1 B. H. C. R. 233.

the test of a composition deed to be that there ought to be a compounding of debts due. It appears to me that judged by this test the document in question would be a composition deed.

In *Pennell v. Rhodes* (4) Patterson, J., said:

"I think that, under the statute, (5 and 6 Vic. C. 122, S. 14), compounding is an arranging with the creditor to his satisfaction. If there is a binding arrangement for discharge of the debt, from which neither party can recede, and with which the creditor is satisfied, it is a compounding, though something still remains to be done."

The case of *Malukchand Amarchand v. Manilal Nansha* (5), decided by Chandavarkar and Bhatti, JJ., appears to me to support the same conclusion. There the debtor passed a document whereby three persons were appointed trustees, which was signed by the debtor and some of his creditors but not registered, and by it the judgment-debtor made over to the trustees his immovable property, goods and the account-books for sale on the day he signed the deed. The Court there said:

"Certain immovable and moveable property of the debtor and his account-books are vested in the trustee for the purpose of paying his creditors. There is no conveyance of the immovable property of the debtor to the creditors. Under these circumstances we think the lower Courts were right in holding that the deed fell within the exemption Cl. (e), S. 17, Registration Act. The deed recites that the composition is for the benefit of all the creditors and all of them are to derive equal benefit from it."

It does not appear to me that the decision of the Queen's Bench Division in *Reg v. Cooban* (2) affords any assistance in the present case. The words of the rule were held to have a particular application, and an earlier case of *Aslatt v. Corporation of Southampton* (6), decided by Sir George Jessel, shows how special words in such a connexion may limit the ordinary notion of compounding. In my opinion the document falls within Cl. (e), S. 17, Registration Act, and did not require registration, nor does it, for the reasons given in *Malukchand's* case (5), require registration under the provisions of S. 5, Trusts Act, of 1882. I would, therefore, reverse the decree of the lower Court and remand the case for trial after admission in evidence of the deed in question. Costs, ccsts in the cause.

(4) [1846] 9 Q. B. 114.

(5) [1904] 23 Bom. 364.

(6) [1880] 50 L. J. Ch. 31.

Batchelor, J.—The only question before us is whether the document, Ex. 67, is a "composition deed" within the meaning of S. 17, Registration Act. The document, after reciting that the family business, which Naginbhai had carried on in his life, was "very extensive and complicated," continues:

"He (Naginbhai) is now dead and I, Bhaidas, am not able enough to carry on the said business further and settle its claims and debts, and myself pay off the debts due to creditors, and the sons of Naginbhai are minors; therefore, it is not possible for them also to continue the family business. Taking all these facts into consideration it appeared to me that by continuing the family business for a longer time we, as well as the creditors, would have to suffer a great loss."

In consequence of these considerations it is then set out, in para. 9 of the deed, which in the original Gujarati is called a "composition deed," that

"I, the said Bhaidas, have made over the whole of the goods and properties and assets belonging to our family for the benefit of the creditors."

Paragraph 10 provides that

"we the creditors also hereby give in writing that after all the above goods and properties are made over to the trustees as mentioned above, no other claim whatever with regard to the amounts due to us shall remain outstanding against Bhaidas and the minors, but the whole claim shall be understood to have been written off as against them; and Bhaidas and the minors and their descendants are duly to make use of this document against us as a release passed by us in that behalf."

Then in para. 11 there is a provision that the trustees are to devote the proceeds of the trust properties to the payment of the creditors "in proportion to their respective claims," as the original is officially translated. It may be observed, however, upon this phrase, that the Gujarati does not necessarily bear the precision of meaning conveyed by the English rendering, and may mean no more than that payments are to be made to the creditors "in regard or relation to their claims."

In *Sheikh Adam Hasanali v. Chandrashankar* (1) it was held by my brother Chandavarkar and me that this deed was not a composition deed, but a mere *cessio bonorum* or deed of arrangement assigning Bhaidas's property to trustees for the payment of the creditors. I still think that that decision was right on the arguments which were then submitted to us, and I venture to doubt whether in English law, from which the technical expression is derived, this

document would be held to be a composition deed. It is not, in my opinion, substantially distinguishable from the deed which, in *Reg. v. Cooban* (2), was held by Denman and Hawkins, JJ., to be not a composition deed. The reasons for which the deed in that case was held to be not a composition deed are, I think, exactly applicable to the deed in this appeal, for, to use the words of Hawkins, J., there is not

"anything to show that the property which the debtor has assigned will not produce twenty shillings in the pound for his creditors. It contains no provision by which any one creditor can be compelled to take less than twenty shillings in the pound if he can get it, for all the property is to be divided, and there is no obligation on any creditor to take less than the full amount of his debt. The deed, therefore does not bind the creditors to take less than the full amount of their debts, and it cannot properly be called an arrangement for a composition; it is in fact an assignment of all his property by the debtor for the benefit of his creditors, who, however, are not asked to make any sacrifice; but who are authorized to divide all the debtor's property amongst themselves."

If, then, the matter rested here, I should feel bound to hold that the deed in suit is not a composition deed for the simple reason that a composition deed is a deed which compounds, and this deed does not compound. The assignor, moreover, does not even profess to be insolvent, but the arrangement is made merely to avoid a possible loss in the future.

The only consideration which moves me now, not without hesitation, to abandon this opinion, is a consideration which was not placed before the Court when the case of *Sheikh Adam Hasanali v. Chandrashankar* (1) was decided: I mean the definition enacted by the Indian Legislature in Art. 22, Sch. 1, Stamp Act, 1899. For "composition deed" is there defined as meaning *inter alia*

"any instrument executed by a debtor whereby he conveys his property for the benefit of his creditors."

Having regard to this definition, to the fact that the Stamp Act is in large measure in *pari materia* with the Registration Act, and to the favour with which such deeds are regarded by the law, I think the better opinion is that the deed in controversy here is a composition deed within the meaning of the Registration Act.

Mr. Inverarity has pointed out that when in 1866 the first Registration Act was passed, which exempted composition deeds, there was no statutory definition of "composition deed" either in the then prevailing Stamp Act or elsewhere; and there is much force in the consequent argument that when a composition deed was first exempted from registration by the Legislature, what was exempted must have been a composition deed as the phrase was understood by English lawyers, and that the undefined phrase was retained, preserving this original meaning, in the successive Registration Acts per incuriam of the special definition which in the meanwhile had crept into the Stamp Act. But to read the two Acts in this way would come very near to reading them as if the legislature, had created traps not only for the unwary, but for the reasonably wary; and, whatever the legislature may have intended in fact, I think that any time after the Stamp Act of 1869, which first enlarged the phrase by statutory definition, it must be taken to have intended that the "composition deed" of the concurrent Registration Act should bear the same meaning. It is open to the Indian Legislature, if it think fit, to enact that a mere cessio bonorum shall for certain purposes be regarded as a composition, and, having regard to the definition in the Stamp Act, I conceive that that is what has happened in reference to the phrase as used in the Registration Act. For these reasons I agree that the deed in suit is exempt from the necessity of registration.

G.P./R.K.

Case remanded.

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BEAMAN, J.

Jan Mahomed Abdulla Datu and others
—Plaintiffs.

v.

Datu Jaffar and others—Defendants.
Original Civil Suit No. 1021 o 1912,
Decided on 6th August 1913.

(a) Mahomedan Law—Applicability—Mahomedans are governed by Mahomedan law and usage—Onus of proof of contrary custom lies on party setting it up.

Where Mahomedans are concerned, the invariable and general presumption is that they are governed by the Mahomedan law and usage. It lies on a party setting up a custom in derogation of that law to prove it strictly. [P 84 C 2]

* (b) Mahomedan Law—Succession—Succession and inheritance among Khojas and Memons are governed by Hindu law.

In matters of simple succession and inheritance it is to be taken as established that succession and inheritance among Khojas and Memons are governed by the Hindu law as applied to separate and self-acquired property.

[P 84 C 2]

(c) Mahomedan Law—Applicability—Khojas and Memons—Hindu Law of joint family is inapplicable to Khojas and Memons.

The Hindu law of joint family does not apply to Khojas and Memons. Nor does the doctrine of "nucleus" apply to these people.

[P 98 C 2]

(d) Hindu Law—Joint family—Where joint family relationship is not fastened by law it cannot be inferred from voluntary act of kindness.

If the joint family relationship is not fastened on certain persons by law, it cannot be inferred that it had been voluntarily undertaken merely because these men have shown great natural kindness to their grandsons and nephews while the latter were helpless children and in need of protection.

[P 96 C 1]

* * (e) Mahomedan Law—Partition—Khojas and Memons—Khoja son cannot sue for partition during father's lifetime.

No Khoja son can sue for partition during his father's lifetime. Nor can he sue for a declaration of what his rights are during the lifetime of his father on the footing of being a member of a joint Hindu family.

[P 98 C 2]

(f) Hindu Law—Family arrangement—State of family fortune at time of arrangement determines its reasonableness.

In estimating the reasonableness of a family arrangement under the Hindu law, what is to be looked at is not the state of the family fortune at the date it is called in question but at the time it was made. If there was then an adequate motive and if, on the whole, it was a reasonable and fair arrangement, the Court will not scrutinize too closely the adequacy of the consideration.

[P 97 C 1]

(g) Limitation Act (15 of 1877)—Art. 127—Property respecting which relief is sought must be joint family property.

The essential requirement of Art. 127, Lim. Act, is that the property in respect of which relief under it is sought must be joint family property. It does not follow from the fact that Art. 127 is not restricted in terms to Hindus that it necessarily extends to every one who is not a Hindu. The criterion of its applicability is the character of the property. That property must be "joint family property" and no such property is known to the law outside the special Hindu law of the joint family.

[P 87 C 1]

(h) Mahomedan Law—Estate—Estate is not joint family property in absence of custom.

On the death of a Mahomedan intestate, his estate cannot, in any conceivable circumstances be joint family property, unless it is by a special custom supposed to be governed by the Hindu law. Such estate is an undistributed estate, to be taken in severalty by the heirs, sharers and residuaries.

[P 88 C 2]

(i) Limitation Act (15 of 1877), Art. 127—Art. 127 does not apply to Mahomedans.

Article 127 does not apply to Mahomedans qua Mahomedans. It would only apply where the property is shown to have gone through an unimpaired descent and to have been held thereafter by the survivors as the joint family property. [P 90 C 1]

(j) Limitation Act, Art. 91—Scope.

Where the existence of a document, if valid and binding on a party, would defeat his suit to recover possession of any property, he must sue under Art. 91, Lim. Act, for the cancellation of that document within three years. [P 91 C 2]

(k) Mahomedan Law—Share in family property relinquished by release by A in favour of his father B, and his brother C—D and E, sons of A, brought up by B and C—Later all property gifted by B to C—Suit by D and E against B and C for declaration that properties were joint and release and gift were void and for partition—Claim to set aside release held to be barred and prayer for partition during lifetime of B, premature—Limitation Act (15 of 1877), Art. 91.

In 1879 A, a Khoja Mahomedan, executed a release in favour of his father B and his brother C, whereby in consideration of a sum of money he relinquished his share in the family property. A's wife was given certain ornaments at the time, while his son D was given a house. After the release A lived separately but his son D and another son E, who was born subsequently in 1893, were educated, married and brought up by B and C. In 1902 B gifted away all his property to C. In 1912 D and E sued B and C for a declaration that the properties and the business mentioned in the plaint were the properties of a joint family and that the release and the deed of gift were void and inoperative. They also prayed for partition of the joint property.

Held: (1) that the release was a fair family arrangement and that it was binding on D and E; (2) that the claim to have the release set aside was time barred under Art. 91; (3) that the plaint disclosed no cause of action, as plaintiffs could not sue for partition during the lifetime of B and it was premature to sue for a declaration of what their rights were at present on the footing of being members of a Hindu joint family. [P 102 C 1]

Bhandarkar and Vaidya—for Plaintiffs.

Mirza Khan, Wadia, Strangman, B. Wadia and Modi—for Defendants.

Judgment.—In this suit the plaintiffs, who are the sons of Abdulla Datu, a Khoja, pray that it be declared that the properties mentioned in the plaint and the business referred to therein are the properties and the business of a joint and undivided family; that the rights of the plaintiffs and the other defendants therein be ascertained and declared; that the said properties be partitioned between the plaintiffs and the

defendants, in accordance with their interests so ascertained and declared; that for these purposes all necessary directions be given, inquiries made, and accounts taken; that in the meantime a receiver be appointed; that defendants 1 and 2 be restrained by an order and injunction of this Court from alienating or otherwise disposing of the same, that it may be declared that the release referred to in the plaint is not valid and binding on the plaintiffs and defendant 3, or in the events that have happened it is inoperative against the plaintiffs and defendant 3; that the deed of gift, dated 8th October 1902, in favour of defendant 2, is void and of no effect as against the interests of the plaintiffs and the other members of the said joint family; and others, for the present, immaterial prayers.

The written statement of defendant 1 sets up limitation, want of jurisdiction, and, without prejudice to those defences, pleads on the merits, adopting the written statement of defendant 2, that the release was not obtained by fraud, etc., but that it was a perfectly fair and valid transaction and has been acted on ever since. Defendant 2 in his written statement says that in or about 1878 defendant 3 and plaintiff 1, who was then his only son, separated from the joint family. The separation was recorded in the release Ex. 1 in this case. At that time, the joint family only owned a small shop wherein groceries and cloth were retailed. In or about 1887, this defendant began to deal in those commodities on his own account. The properties mentioned in schedule A were all bought after the aforesaid partition, except a small house at Malad which came to the share of defendant 1 on the partition, while the only other immovable property of the family was allotted to the first plaintiff on the same. Most of the said properties belong exclusively to this defendant. Denies that since the death of Jaffir and the partition in 1878 defendant 3 or plaintiff 1 lived with defendant 1 or himself as members of a joint and undivided family or as such acquired any immovable property or carried on any business. At the date of the said partition, this defendant was a minor, and the family then owned no immovable property in

Bombay. Denies fraud, undue influence, etc. Denies that the plaintiffs and their mother Ratanbai were maintained out of the joint family property or continued to live as members of the joint family after the release. Admits the performance of certain ceremonies but denies that the expenses were defrayed out of joint family funds. The release was acted upon and defendant 3 is still living in the house given under it to plaintiff 1. Denies that this defendant induced defendant 1 to execute the deed of gift of 1902. Says that defendant 3 and plaintiff 1 have been living separate from the joint family ever since the release and have had nothing to do with the Bombay business and denies that the properties claimed were acquired by him for the joint family as benamidar but were his own self-acquisitions. Says that he employed plaintiff 2 in his shop but had to get rid of him as he was useless. The plaintiffs then set on foot rumours that they were interested in the properties now claimed in consequence of which these defendants had to file the suit in the Thana Court. This defendant separated in estate from defendant 1 in 1885, but has continued to live with him. Sets out his self-acquisitions. Pleads limitation, and want of jurisdiction.

A perusal of these pleadings is instructive as showing how deeply this community has, under the pressure of judicial decisions, become tinged with the peculiar notions of the Hindu law of the joint family. In order to understand at the outset what is substantially in controversy, it may be well to state one or two of the salient facts.

For the purposes of this case, the family may be taken to have consisted of the father Jaffir, his only son Datu, and his two sons, Abdulla, defendant 3, and Ismail, defendant 2. Abdulla had one son, plaintiff 1, Jan Mahomed, at the date of the release, dated 13th February 1879.

Some 12 or 13 years later, the second plaintiff, Aziz, said to be now about 20, was born.

There can be no doubt, indeed this is not denied, that during the lifetime of Jaffir, there was a small nucleus of "joint family property" which on his death was taken jointly by the survi-

vors. The amount of this nucleus is disputed, defendant 3 swearing that it was about Rs. 10,000, while defendants 1 and 2 would reduce it to something inconsiderable. But at the highest I do not think it could fairly be taken to have exceeded Rs. 4,500, the figure alleged to have been made the basis of the partition effected by the release of 13th February 1879. The whole of that property was at Malad beyond the local limits of this Court's jurisdiction. But between 1880 and the date of the suit Ismail, defendant 2, either by himself or assisted by his father Datu, defendant 1, has acquired a great deal of valuable property in Bombay. I was told in the course of the trial that this property was now probably worth a lakh of rupees. It cannot be pretended, and it has hardly been seriously argued, that either of the plaintiffs or their father contributed in any way to this enlargement of the family fortunes. True, plaintiff 1 has vehemently contended that he worked from a very early age in his grandfather's business, but there is no reason to suppose that if he did, his services were of any value. He is a feeble diseased man, who, according to his own letters, was never able to earn a penny when left to himself. Abdulla, defendant 3, has been a confirmed drunkard and loafer since his early youth. He has sworn that he took to drink at the age of seven and admits he has never done any work at all since the partition or release. He has lived in the house given by that release to his eldest son, plaintiff 1, upon a pittance of eight annas a day allowed him (I suppose for drink) by Datu and four annas a day given him by his mother, with daily rations of food.

Plaintiff 2 is only now about 20 years of age and certainly could not have been of the least service to the family as a producer. Such being the facts, it is clear that, apart from the special features of the law of the Hindu joint family, these plaintiffs have no shadow of moral right to share in the life's earnings or acquisitions of their uncle Ismail. Datu, the grandfather, is a very old man, stating his age to be 86. In 1902, he made a gift of all his Malad property to his son Ismail, who was then the efficient representative of the family. By this deed of gift, he appears

to have reserved to himself some Rs. 7,000 and it has been argued that he did this designedly to provide adequate shares in the joint family estate, as he believed it to stand, for his son Abdulla and his grandsons the two plaintiffs. Assuming that that were so, though I do not believe that it was, it would indicate that Datu himself laid no claim at all to the valuable properties which Ismail claims to have acquired for himself in Bombay. Nevertheless if the doctrine of nucleus is to be applied, I think it would be extremely difficult for defendant 2, in the face of his own pleadings, to escape its legal consequences.

Succinctly stated, that doctrine, originating in our Courts in the old case usually called the *Peshwa's* case appearing to have been decided by Mount Stuart Elphinstone, is that where there has been a nucleus of joint ancestral family property, all subsequent additions and acquisitions by any member of the family, while still living in union with the rest, immediately take the imprint of the nucleus, and are joint family property liable to be divided on a partition between all the then existing members of the joint family. In the present case, for example, since it is admitted that the family was joint (vide written statements) and that there was a nucleus of joint property, which became on the death of Jaffir, ancestral joint family property, it follows that as Ismail has never separated from Datu, all his later earnings and acquisitions would be traced theoretically to the fund from which they grew, and would be joint family property liable to be divided between every member of the joint family now alive. It would be open to Ismail to prove, if he could, that notwithstanding the original nucleus, his own acquisitions were made independently of it, and were therefore true self-acquisitions not liable to partition between the members of the joint family. But this is always difficult. Indeed where the person claiming to have made such self-acquisitions has nevertheless remained in all other respects a member of the joint family, living in union or, as the phrase goes, joint in food, worship and estate, it becomes, I think, virtually impossible for him to prove that he has acquired personal and separate wealth for himself not traceable to the "nucleus"

root. The stock phrase just quoted appears peculiarly inappropriate to Mahomedans. A family may very well be joint in food, that is, the head of the family may keep an open table and give boarding and lodging not only to his sons and grandsons, which in accordance with oriental custom and the calls of natural affection, every Mahomedan would probably do if he could afford it without the remotest intention of thereby giving any colour to claims which those who had thus enjoyed his hospitality might afterwards put forward to strip him of his wealth. But what could be meant by joint in worship? All Mahomedans are joint in worship, if they are good Mahomedans in a religious sense, although, as among members professing other great religions, there are to be found minor sects, and slight divergencies of ritual and dogma. Joint in estate begs the whole question. Mahomedans under their own law are never joint in estate, whether they live together or whether they do not.

It is only when certain Mahomedan communities have been declared to be governed by the Hindu law that the terms have any meaning. Living jointly in estate then means no more than that if once they have formed a joint family the members have not separated and partitioned the property, or possibly in the case of a single member desirous of withdrawing from the joint family, without effecting a complete partition, he has not given a valid release of all his claims upon any share of the joint property. And I hope to show presently that judicial decisions have laid down sweeping propositions which have had an extremely disastrous influence upon the flourishing and wealthy Khoja and Memon sects, and have gone far beyond any needed or hitherto known application of the rule that a proved special custom may override the general law. This case raises many interesting questions of far-reaching importance. It would be easy to answer them all in the usual way by citing this or that authority; but I have felt, in the course of the elaborate arguments addressed to me, particularly after a careful study of all these authorities, that it is time, and this may be a fitting opportunity, to resume from the beginning the course

of judicial decisions ; to examine those decisions critically and ascertain, if possible, what is the precise law today governing Khojas, Memons and less important classes of Mahomedans, who by one or another judicial decision have been subjected to their own serious prejudice and detriment, in my opinion, to the Hindu law of the joint family.

I want to follow closely, if I can, not only the decisions, but the reasoning upon which they are based, which, commencing in 1847 and proceeding with variations to the present day, are supposed in this Court to have established the proposition that the law of the Hindu joint family in its entirety governs the Khojas and Memons of this Presidency. I feel the imperative need of some such complete and exhaustive critical analysis of the case-law, first, because I am convinced that, under existing conditions, the strict application of the law of the Hindu joint family, with all its legal incidents (none of which, as far as I can see, can logically be discarded), to the commercial fortunes of these people, is a very great and ever growing hardship; secondly, because I doubt very much whether, in spite of the glib manner in which cases involving such grave consequences are cited, and accepted as final, the learned Judges responsible for most of the important decisions have really given, or meant to give, the complete law of the Hindu joint family operation over the Khojas and Memons of Bombay. If it can be shown that certain propositions to be found in these judgments are really obiter, and have been much too broadly stated, the way will be prepared, if no more, to a reconsideration of the whole subject. That this is eminently desirable, no one acquainted with the recurring litigation, rapidly increasing in volume, attributable to this single cause, will be disposed to doubt. If, after all, the case-law should be found to be inimpugnable the legislature must very soon step in to relieve these trading communities from the oppression of a system of law which does not properly belong to them, which was imposed upon them under totally different social conditions, and is utterly repugnant, not only to their secular interests, but to their own law and religion. And here I will take the opportunity of quoting a passage from a judgment of

my own in *Karsandas Dharamsey v. Gangabai* (1) :

"The fundamental principle of the Hindu joint family is the tie of sapindaship. Without that it is impossible to form a joint Hindu family. With it, as long as a family is living together, it is almost impossible not to form a joint Hindu family. It is the family relation, the sapinda relation, which distinguishes the joint family, and is of its very essence. The object of the early Hindu lawyers in clothing this family relation with special legal sanctions and far-reaching consequences was quite clearly to preserve the continuity of the family and seems to harmonize completely with so much else that is peculiarly characteristic of the Hindu law, and sentiment, similarly exemplified in caste restrictions, and indicative of the deep interpenetration of law by religion. The first care of the Hindu law-giver was to perpetuate religious observances, to perpetuate, therefore, the family, as a permanent unit, of which each succeeding generation was under sacred obligations to perform religious obsequies for the benefit of ancestors. Obviously connected with this is the need of worldly provision, and hence the legal attributes of joint family property. There can be no alienation or delegation of spiritual duties. If the father could deprive his sons of the whole family property, he might render them incapable of duly discharging his appointed obsequies. So that where a father and sons held property together, the sons, along with religious duties, acquired civil rights, and in the same manner their sons and sons to the uttermost limit of the sapinda tie. That is the theory of the joint Hindu family, and I have no doubt that until English lawyers took it in hand, introducing English notions, often on an imperfect acquaintance with the Hindu system, that it was almost uniformly and consistently worked. I do not deny that there were probably always exceptions in favour of special self-acquisitions, but these were exceptions, and the general rule was that where father and sons had lived in 'commensuality' with property applied to the common uses, whether that property had or had not in the first instance been acquired by the father it received the impress of joint family property and fell under the law regulating its descent."

I quote that passage because I am still of opinion that it rightly states the theory of the Hindu joint family in its connexion with the law and points clearly to its essentially religious origin. But surely had that been not only fully realized but kept prominently in sight it might have given pause to any Court about to decide, as upon a mere custom in a particular case, that this quite unique branch of the Hindu law, rooted in, and inseparably bound up with, Hindu religion, could in its entirety be transferred to large bodies who were not Hindus, but had a law and a re-

(1) [1903] 32 Bom. 479=10 Bom. L.R. 184.

ligion of their own, of a totally different and, on the whole, antagonistic character. It is true that this momentous change was brought about in the first place with special reference to the origin of the Khojas and Memons. These were originally Hindus who were converted to Mahomedanism about five hundred years ago by the Pir Sadruddin. And Sir Erskine Perry, whose judgment I am about to deal with, was satisfied that, notwithstanding the lapse of time since their conversion, these peoples had adhered to the Hindu law of the joint family. But I doubt whether this makes allowance enough for the intimate and inseparable interpenetration at all points of law and religion among Hindus and Mahomedans. It is possible, but *prima facie* unlikely, that whole bodies of Mahomedans, neglecting the commands of their own law and the influence of their own religion, should adopt, merely by way of custom, the entire complicated and technical law of the Hindu joint family; but doing so could hardly be due, as Sir Erskine Perry appears to think, to inherited traditions, and a kind of religious atavism, nor after such adoption could any cogent reason be found to sustain the system. On the contrary, as time went on and these Mahomedans gradually lost sight of their ancestry before conversion, the imperativeness of their own law and religion would certainly tend to dissipate rather than encourage any belated inclinations towards the old faith with its resultant laws that might have survived. Much more likely, of course, is the explanation that this assimilation is to be attributed to the pressure of surrounding Hinduism. But that is quite a distinct cause from that sought in these converts having been made from Hinduism. Any effects of that cause might reasonably be expected to have expanded themselves and disappeared in, say, a century. It is, however, true that the preponderance of Hinduism, numerically at least, and its continuous pressure on other relatively small bodies enveloped by it has shown itself to be more than once a *vera causa* of these latter embedded alien elements assuming, more or less completely, the general colour and character of the surrounding mass. There can be no doubt, for instance, but that during

the years of their weakness and dependence for very existence upon the tolerance of the larger peoples surrounding them, the Parsis became something very like a Hindu caste. On the other hand, in estimating the pressure of such forces it should not be forgotten that never has the tension and vigour of the Moslem faith, as a whole, been so relaxed or spent, in Asia at any rate, as to allow its adherents to succumb to the mere dead weight of surrounding numbers. And it certainly does seem antecedently improbable that converts, who are usually most zealous for their new faith, should, at a time when Mahomedanism was still aggressively predominant in India, have quietly lapsed back under the mere dead weight of Hindu environment, into, so far as all the practical side of life and business was concerned, their former Hinduism. Borrowing a custom from a neighbouring society is one thing; but the absorption of a complete group of legal notions in all their rigidity, rooted in and indissolubly bound up with an alien religion, and thus absorbed, regulating the largest part of life on its social and economic side, is surely quite another.

There would be nothing very surprising in the Khojas and Memons having adopted the custom from Hinduism of allowing daughters on an intestacy no more than maintenance or dower; but it need not follow from that, even be the custom proved, that, because that custom is consonant with the notions of the Hindu joint family and directly opposed to the Mahomedan law of succession, that those who had adopted it had at the time voluntarily and consciously adopted along with it every other legal incident of the Hindu joint family. And it may now be very confidently asserted that, whether or not the Khojas and Memons of this Presidency had in 1847 adopted customs based on the law of the Hindu joint family, had those customs not been rather hastily, as I cannot help thinking, been stereotyped by judicial decisions, they would long before this with the expanding commercial prosperity and industrial enterprise of these peoples, have been utterly repudiated and abandoned. But a course of decisions beginning with the Khojas' and

Memons' case, *Hirbae v. Sonabae* (2), which I shall now examine, soon riveted the fetters of the law of the Hindu joint family upon these and later other Mahomedan groups in this Presidency so that it now remains to be seen whether it is possible to undo what has been done, and so relieve these progressive and wealthy communities from what I believe is generally coming to be felt an intolerable burden. Take this comparatively small case as an example. But for the extension or supposed extension of Hindu law to Khojas in all matters of property, succession and inheritance, no litigation of this kind would have been possible, nor would an energetic trader like defendant 2, Ismail, have been put to the risk of being obliged to share his property, undoubtedly, in fact, whatever fanciful theories of law may be woven about it, the result of his own skill and industry, with a brother and nephews who can have no remotely conceivable moral or equitable right to a penny of it.

What Sir Erskine Perry had to try in *Hirbae v. Sonbae* (2) was a narrow question of an asserted custom amongst these sectaries. The plaintiffs claimed under the Mahomedan law (the authority of the Quran) their share of their father's estate. The defendants set up a custom of the Khojas by which daughters were entitled to no more than maintenance and dower. Exactly the same point was in controversy in the connected case. But it will be seen from the judgment that at that time the Memons occupied a better social position than the Khojas, and were already recognized as a flourishing and progressive community. Part of the reasoning, then contained in the first part of the judgment, is to be restricted entirely to the Khojas as they then presented themselves to the learned Chief Justice. Although the Khojas were described as generally poor, illiterate and ignorant of their own law and religion, a considerable sum must have been directly or indirectly at stake. The estate of Hadjibhai Mir Ali is stated to have been about three lakhs of rupees. A custom as yet *res integra* was to be proved; yet it appears that all the evidence was recorded in two

days. In that short time, the learned Chief Justice says that a great deal of oral evidence fairly representing the views of the entire sect was taken. What a contrast between those days and these! Were such a suit to come up for trial in this High Court today, it is safe to say that it would occupy months. And it certainly does seem surprising that within the compass of two days, the Court should have been able to get evidence enough to satisfy itself upon so large and vital a question as that which was then determined. It is significant too that the learned Chief Justice very plainly thought that by affirming the alleged custom he was conferring a benefit upon the Khojas and Memons and giving legal sanction to a venerated and highly prized usage. This is clear, I think, from that part of the judgment in which the question of how far the *lex loci* should be applied is elaborately and learnedly discussed. It is part of Fate's grim irony that what was meant to be so great a boon should have with the lapse of time turned out to be a grievous burden. In 1847, the Khojas collectively were a scattered ignorant sect, residing principally in Cutch, Kathiawar and Bombay, whose commercial activities had not extended much beyond retail business on a very small scale, and many of them dressed like the Hindus, one of whose customs they were interested at this time in upholding. But today the Khojas like the Memons are far from being illiterate, have made great strides in social and commercial development, and for their numbers, are probably as rich and thriving an industrial community as any to be found in the Empire. There is probably not an intelligent leader, or fairly representative man in the whole sect, who would not be pleased to be relieved of this nightmare of the Hindu law of the joint family hanging over all his business activities. The case was different even then with the Memons, and Sir Erskine Perry notes that having regard to the great amount indirectly, at any rate involved in his decision it is likely that the decision of the Privy Council will be invited. It would not therefore be fair to criticize this judgment from a point of view suggested by the first part of it alone, or to doubt that it would have been or might have been different, had the state

(2) [1847] Perry O. C. 110 = 4 Ind. Dec. (O. S.) 100.

of both Khojas and Memons in 1847 been what it is today. But I cannot too strongly insist upon the extremely restricted scope of the inquiry. It was restricted to one alleged custom and that alone, namely the custom of excluding females from any share in a paternal estate. As far as I can see, and I have read the whole judgment very carefully, and I may say with interest and admiration the learned Chief Justice never meant to decide or supposed himself to be deciding anything more. It was a custom which all that was influential and likely to be audible in the sect was interested in affirming; those who pleaded against it for their rights under their own law were young defenceless women. Even today the Khojas and Memons would probably not object to the continuance of that custom standing alone. But parts of the learned Chief Justice's judgment, which are really no more than obiter, appear to presuppose as the ground of his decision a view that the Khojas and Memons had adopted not only this custom but the whole of the Hindu law to which it owes its origin. If the judgment be strictly analyzed it will be found to go no further than this: (1) That a reasonable custom alleged and proved to have existed among a class, and not opposed to the written law of the ruling power (meaning here the English statute law), may be sanctioned by the Court. (2) That the words in the Charter of the Supreme Court, "Law and Usages of the Mahomedans" did not preclude a custom being legally recognized although it might conflict with the Divine law of the Quran. (3) That this particular custom was proved to exist among both Memons and Khojas. (4) That for the purposes of that case, the *lex loci* must be subordinated to the personal law of the litigants and that old, well-established usage, not conflicting with any written law of the ruling power was part of that personal law and ought to be enforced by the English Courts. I hope I may be permitted to say that Sir Erskine Perry's judgment in this case is one of which this High Court may well be proud. But it certainly does not go the length or anywhere near the length to which it appears to have been carried later.

The next case in chronological order

is *Gangbai v. Thavar Mulla* (3). This was a suit or petition by Gangbai, (who must, I think, have been the same *Gangbai plaintiff v. Sonobai* in the Khoja case just discussed), to have a charitable bequest contained in the will of Rahamatbai, widow of Sajan Mir Ali, set aside and to have her whole one-fourth of the residuary estate so bequeathed in charity, as the sole heir of Sajan Mir Ali. It is pretty clear from the form of the petition that whatever Sir Erskine Perry had decided or meant to decide in the *Khojas' and Memons'* case (2), neither the petitioner here, nor her legal advisers, nor the Court, understood that decision to have made the entire Hindu law of the joint family applicable to these Khojas. Else, of course, there could have been no question of the widow making a will at all. The point actually decided is quite unimportant, but the case is interesting because it illustrates the almost hopeless confusion of thought, which prevailed at that time in the Court, over questions of Hindu and Mahomedan law. The judgment was delivered by Sir Mathew Sausse, who says:

"It appears that Rahimatbai was a female of the Khoja caste, which, although Mahomedan in religion, has been held to have adopted, and to be governed by, Hindu customs and laws of inheritance."

I pause here to observe first that the Khojas are not a caste. Sir Erskine Perry is careful to call them sectaries. The use of the word "caste" implies that they were rather Hindu than Mahomedan and goes a long way towards begging the crucial question. But what follows illustrates still better the extremely loose way in which law is made by judicial decisions. It certainly was not held, as I have just pointed out, that the Khojas and Memons had adopted Hindu customs and laws of inheritance generally. Not a word, I believe, will be found in Sir Erskine Perry's judgment to support the proposition that he held that the Khojas had adopted the Hindu law or laws of inheritance. What he did find was that a single particular custom, which belongs rather to the Hindu than the Mahomedan law, was proved to exist among Khojas and Memons. Later, the learned Chief Justice says:

(3) [1862-65] 1 B. H. C. R. 71.

"Now represents the rights of the Khoja or Hindu heir-at-law."

Again it is assumed without any evidence that Khoja and Hindu are interchangeable terms when prefixed to the words "heir-at-law" an assumption, it is submitted with respect, for which there is absolutely no foundation.

In 1866 *In the goods of Mulbai* (4) was decided. It was held by Couch, C. J., that by the custom of Khojas, when a widow dies intestate and without issue, property acquired by her from her deceased husband does not descend to her blood relations but to the relations of her deceased husband. Here we come in limine upon another instance of that confusion of thought or loose use of language which hangs like a pall over this branch of the law. The actual point decided was that there was a custom proved amongst the Khojas (by the evidence of three witnesses only as far as I can see) which entitled the husband's relatives to succeed to his widow's estate, if she died intestate, in preference to her own kin. What is remarkable is that it appears to have been taken for granted in the statements of the witnesses quoted that a Khoja widow could will away the whole of her husband's estate which is as inconsistent with the Hindu as with Mahomedan law. The learned Chief Justice says:

"I agree with the observations of the counsel for the caveator that the law by which the Khojas are governed is not, properly speaking, Hindu law, but probably that law modified by their own peculiar customs; and I think it has been sufficiently established that there is a Khoja custom which excludes the wife's relations from succeeding to property such as this."

All the comment which such a passage requires is that it appears to assume that in the first instance Khojas would be governed by the Hindu, rather than the Mahomedan law, and that it would lie on any Khoja so alleging to prove that the Hindu law had been modified by some Khoja custom. With great submission that inverts the order of procedure. For surely in every case, except those in which a custom has already been legalized, it is to be presumed that the Khojas being Mahomedans are governed by the Mahomedan law until a contrary custom has been established.

In 1874 *Shivji Hasam v. Datu Mavji*

(4) [1864-66] 2 B. H. C. R. 276.

Khoja (5) was decided, and it is from this time onward that the law becomes more definitely stereotyped. The case is commonly summarized thus:

"In the absence of sufficient evidence of usage to the contrary, the Hindu law is applicable in matters relating to property, succession and inheritance amongst Khoja Mahomedans."

It will be noted that if this correctly represents the decision, a great step has been made. Now, it is to be presumed that Khojas, although Mahomedans, are governed by the Hindu law in all matters relating to "property" as well as succession and inheritance. It, therefore, becomes necessary to examine this judgment with some closeness. In the first part of the judgment devoted to the question, whether the property of the deceased had vested in the District Court, all that I need notice is that the learned Michael Westropp, C. J., speaks of Shivji as a "co-parcener" and again as the manager of an undivided Hindu family. So far it appears to be taken for granted that the Khojas are governed by the Hindu law of the joint family, a proposition for which until this judgment there is absolutely no authority I believe to be found anywhere. The learned Chief Justice proceeds next to consider the contention that Khojas are not necessarily governed by the Hindu law of the Mitakshara. He refers to the cause celebre of *The Advocate-General ex-relatione Daya Muhammad v. Muhammad Husen Huseni* (6), decided in 1866 by Sir Joseph Arnould, but does not appear to deduce anything from it. He then goes on thus (p. 291):

"But in matters relating to property, succession, and inheritance, the Khojas appear to have retained to a considerable extent the Hindu law. In *Hirbae v. Sonabae* (2), they succeeded in showing that the Quran did not govern the order of succession amongst them (Then after setting forth the facts of that case and merely inferring from those facts that Sir Erskine Perry's decision went much further than in fact it did, he goes on). "The traditional doctrine of the Supreme Court and of the High Court has, for upwards of, at least, 25 years, been that, in the absence of proof of special usage to the contrary, the law applicable to Khojas is in matters relating to property, succession, and inheritance, the Hindu law as administered in this Presidency. Accordingly, in *Gangbai v. Thavar Mulla* (3), we find Sir Mathew Sausse, C. J., saying that the Khoja caste, although

(5) [1875] 12 B. H. C. R. 291.

(6) [1875] 12 B. H. C. R. 323.

Mahomedan in religion, has been held to have adopted and to be governed by Hindu customs and laws of inheritance."

"I pause here to repeat that, while, undoubtedly, Sir Mathew Sausse does say that, it is apparently a mistake since I am unable to find any case in which anything nearly as wide as that, ever was decided.

"In *In the goods of Mulbai* (4), already mentioned, it was held that when a Khoja widow dies intestate and without issue, property acquired by her from her deceased husband descends to his relations, and not to those of the widow."

I pause again to point out that my critical examination of that case shows that it does not pretend even to decide more than the narrow question before it, namely, which is first in succession to a Khoja widow holding her husband's property, her own or her husband's kin? and expressly leaves it in doubt, to what extent the Khojas are governed by the Hindu law in other matters of property, succession and inheritance. The learned Chief Justice goes on :

"In a contest for administration in a case of intestacy, which has lately arisen between the mother and widow of a Khoja at the Ecclesiastical Side of the High Court, and, after occupying Sir Charles Sargent many days in hearing, now stands for judgment, the Ecclesiastical Registrar has collected several precedents at that side, some being cases disposed of by the Court and others by the Ecclesiastical Registrar. In all, the Hindu law, as indicating the person entitled to succeed to the property, would seem to have been taken as the guide in granting Letters of Administration, except in one or two instances, in which the person so entitled expressly consented to the grant to another."

This I take to be the real foundation of the decision for, as I have shown, the other cases cited so far certainly do not support it. But what is this ground? It is so vague that it can hardly be examined. But put at the highest it seems to be no more than this: that in intestacies on the ecclesiastical side, the Hindu law is followed in choosing the heir. Whether that practice be warranted or not, it is surely insufficient to be the basis of so wide a proposition as that the Khojas are governed by the Hindu law in all matters relating to "property, succession and inheritance."

The learned Chief Justice then cites the case of *In the goods of Vallu Musani*, decided in 1855, where administration was granted by the Court

to an undivided brother of the deceased in preference to his widow. I am unable to find that case, but I do not think it would throw much light on the problem I am trying to solve. For here again the entire question is begged when the brother is described as the "undivided" brother of the deceased. Upon these materials, the learned Chief Justice concludes:

"We think that we must consider it as the settled rule in Bombay, that, in the absence of sufficient evidence of usage to the contrary, the Hindu law is applicable in matters relating to property, succession and inheritance amongst Khoja Mahomedans. There has not been any evidence that in such a case as the present, there is in Bombay any usage amongst Khojas opposed to the Hindu law. And no evidence has been given to the effect that the ordinary rule in Bombay, namely, that of the Hindu law, is not applicable to Khojas at the Thana. We think therefore that we are bound to apply to them the Hindu law."

In this way, the conclusion is very summarily reached, a conclusion fraught with disastrous consequences to the Khoja community, that the Khojas are subject to the Hindu law in all matters relating to property, succession and inheritance. I have traced the process step by step from its innocent beginning to its completion in this judgment. No one who reads the cases critically can help admitting that from the first the learned Judges, responsible for these far reaching decisions, have enlarged Sir Erskine Perry's decision per saltum. It is easy to say that this or that has "been held" or that the "traditionary doctrine of the Supreme Court and the High Court," has been this or that. But examination shows that what is thus declared in general terms to have been held, never has in fact been held, and that the "traditionary doctrine of the Supreme Court and the High Court" is a very unsound foundation for the large conclusion based upon it.

In the goods of Rahimbhai, Hirabai v. Gorbai (7) was decided by Sir Charles Sargent in 1875. It was here held that a mother was entitled, by the custom of the Khojas, to the management of the estate, and therefore to Letters of Administration in preference to a wife or sister. Here for the first time since 1847 we find, in the opening passages of Sargent, J.'s judgment, an accurate statement of what really was decided

in the *Khojas' and Memons'* case (2) by Sir Erskine Perry. The learned Judge goes on (p. 300):

"But it was said that in any case, since the judgment of Sir Erskine Perry, a uniform practice has prevailed in this Court in the exercise of its ecclesiastical jurisdiction, both in its contentious and non-contentious business, of administering the Hindu law of inheritance in the absence of proof of any special custom to the contrary. Now, an examination of the records of the ecclesiastical side of the Supreme Court (during the interval of 16 years which elapsed between the date of Sir Erskine Perry's decision and 1863) shows that there were as many as ten applications for Letters of Administration to Khoja estates, seven of which were disposed of by the Registrar as non-contentious business and three by the Court itself."

(The learned Judge then deals with the instances and proceeds :)

"It is to be remarked that in all these cases, with the exception of two, the widow either applied for administration or entered a caveat, and that in all administration was either given to the widow, or, if not, it was with her consent, or under special circumstances analogous to those of an undivided Hindu family, as in the case of *Vallu Musani*. It may be said that it would be unsafe to draw any positive conclusion from these scanty materials as to what the practice of the Court really was, although they, undoubtedly, point to such a practice as I have stated, and are difficult to explain on any other supposition."

The learned Judge then finds strong corroboration elsewhere, and cites the case of *Gangbhai v. Thavar Mulla* (3). The learned Judge also notices the case of *In the goods of Mulbai* (4). He concludes:

"This summary of the decisions of this Court, as well as of the cases disposed of by the Registrar in the non-contentious business, explained by the remarks of Sir Mathew Sausse in *Gangbhai v. Thavar Mulla* (3), satisfactorily shows, I think, that the Khojas have, for the last 25 years at least, been regarded by the Court, in all questions of inheritance, as converted Hindus who originally retained their Hindu law of inheritance, which has since been modified by special customs, and that uniform practice has prevailed during that period of applying Hindu law in all questions of inheritance, save and except where such a special custom has been proved."

Now assuming that the conclusion reached by the learned Judge upon a careful examination of all the materials then available be correct, it ought not to be illegitimately extended. What Sargent, J., held was that in matters of succession the Khojas were governed by the Hindu law. But in the particular case he found a practice utterly opposed

to the Hindu law proved. The concluding part of his reasoning quoted above suggests this comment. Admitting that the Khojas were Hindus before their conversion it would not necessarily follow that they "originally" took over with them into their new faith, the whole of their old law founded on their old religion, and it is only by gradual modifications that they have departed from it. The contrary is much more likely to be true. For converts, as previously observed, are usually zealous, and in the flush of conversion would be most unlikely to retain anything which in a peculiar degree linked them with the faith they had deserted. What probably happened was that as the fervour of their Mahomedanism cooled, and they felt more and more the surrounding pressure of Hinduism, they insensibly re-adopted many of the customs and notions belonging to Hindu law and religion. It is historically probable that the numerous Catholic converts to Christianity of the Western Coast of India, who can now hardly be distinguished from their Hindu neighbours, were at the time of their conversion very zealous and orthodox Christians. The point is of no practical importance. For adopting Sir Charles Sargent's conclusion it goes only this length that in matters of succession it lies upon Khojas, who assert a custom opposed to the Hindu law, to prove it. That is a much more cautious statement of the real state of law, and based on much more solid material, than the wide proposition that, until the contrary be proved, Khojas must be taken to be governed by the Hindu law in all matters relating to property, succession and inheritance.

This case went up on appeal and Westropp, C. J., in delivering judgment said :

"It is however evident, from what has been said that the Khojas are not as firmly bound in matters of succession and inheritance by the Hindu law, as Mahomedans proper are by the Mahomedan law or Hindus by the Hindu law Now it is manifest that such a state of the law must greatly encourage litigation and we cannot help thinking that it would be most desirable that the Government should take steps, as was done in the case of the Parsis, to ascertain the views of the majority of the community on the subject of succession and should then pass an enactment giving effect to those views."

I emphatically indorse those observations of the learned Chief Justice though I doubt whether if what really had been decided in every case, as yet noticed, except *Shivji Hasam v. Datu Mavji Khoja* (5), had been clearly realized, the mischief, to which Westropp, C. J., adverts, need not have been so serious, as it has since undoubtedly become. If the Khojas had been left under the Mahomedan law in all matters except those of intestate succession proper, that is to say, cases arising upon an intestacy, some of the heaviest cases which have since taken up the time of the Courts and exhausted the moneys of the litigants, need never have been heard. The present is a case in point. Even so I think the decisions have gone much too far. For the analysis I have bestowed on the cases reveals the truth, that only two true customs were set up before the decision of Sargent, J., in *Gorbai's* case (7) namely, the custom of excluding daughters from the share they would ordinarily have been entitled to, under the Mahomedan law, and the custom of preferring the husband's male relatives to the widow's kin in succession to property received by a Khoja widow from her deceased husband. *Gorbai's* case (7) adds a third custom which is neither consistent with Hindu nor Mahomedan law, namely that the mother is entitled to administration before the widow. The root of all the mischief that is really dangerous is to be found in the assumption made by the Court ever since *Gangbai v. Thavar Mulla* (3), that the Khojas were to be presumed to be governed by the Hindu law in all matters of succession, inheritance, and [since *Shivji's* case (5) till once more modified by *Ahmedbhoy Habibbhoy v. Cassumbhoy Ahmedbhoy* (8)] "property." This presumption suddenly makes its appearance springing from nowhere, rooted in nothing but "the traditional practice" of the Supreme and High Court and one or two obiter dicta of Sausse, C. J., in *Gangbai v. Thavar Mulla* (3). I say obiter dicta, for the point which had to be decided, and was in fact decided, was this and this only: whether a certain bequest to charity was bad for uncertainty. The decision turned upon the use of the English word "charity" in an English will, and it ap-

(8) [1889] 13 Bom. 534.

pears to me that it was entirely unaffected by the rather strained, I should be inclined to say, irrelevant, argument out of which those observations of the learned Chief Justice arose. It seems to have been contended that because the Khojas were a "Hindu caste" in the eye of the law, the use of the word "charity" in the will of a Khoja woman must be a translation of the Hindu word "dharam." Gifts to "dharam" have been held void for uncertainty, therefore, this gift must be void. Sausse, C. J., while seeming to accept the premise that the Khojas were a Hindu caste for all purposes of succession and inheritance (which was going much further than any case decided up to that time), held that as the will was in English drawn under English advice, "charity" was not to be read as a mere translation of "dharam," but in its English legal sense, and so the gift was good. I am unable to agree with the later opinion that these dicta of Sausse, C. J., were more than obiter.

And as to the other root of this presumption, what is to be said for the "traditional practice" extending over a period of 25 years. It turns out to consist of ten cases in the 16 years following on Sir Erskine Perry's judgment and of these seven were non-contentious. In the next nine years, there were very few cases and it would probably be within the truth to say that this traditional practice rests upon less than half a dozen contentious cases disposed of, on the ecclesiastical side of the Court. It might be argued that the form of the petitions even in the non-contentious cases shows clearly that the parties interested launched their petitions on the understanding that the Hindu law governed them. But I attach little or no importance to any such consideration. For the form of pleadings is pretty sure to be moulded by the views of practitioners, and it is clear that the profession jumped early to the conclusion that the Khojas were only Mahomedan in name, while in fact and in the eye of the law they were a "Hindu caste." The truth is that the origin of the series, Sir Erskine Perry's decision, does not raise any such presumption at all, but the exact contrary. That learned Chief Justice appears to have thrown, and very rightly, the onus of proving a custom opposed, not to the

Hindu but to the Mahomedan law, upon any Khoja alleging it. And it is very difficult to account rationally, except upon the supposition of sheer misunderstanding, for the sudden inversion of this process which so soon came into vogue and appears to have met with the approval of the Court. Up to this point, then, the point from which it is generally thought by the profession, the law became settled to this effect, that in all matters relating to property, succession and inheritance, the Khojas were to be presumed to be governed by the Hindu law, until a custom to the contrary was proved. I hope I have shown that if so settled at all the law was settled on the most insecure basis. I have paused here, because the decision in *Shivji Hasam v Datu Mavji* (5) is commonly cited as having finally laid down this rule, which has subsequently undergone at least one most material modification, and partly because I want to point out that what had to be decided and was in fact decided in *Shivji's* case (5) had nothing whatever to do with either succession or inheritance, but grafted on the law of the Khojas a dominant feature of the Hindu law of the joint family.

I do not think it can seriously be contended, when all the available materials have been thoroughly examined, that there was any warrant either in the case law or the traditional practice of the Court, then extant, for such an extension of all previous decisions.

The case in question came before the Court as a special appeal; it appears to have been treated in the lower Courts as though it were an ordinary case under the Hindu law; I do not think any special custom either in derogation of the general Mahomedan or Hindu law was set up or proved. But the learned Judges appear to have proceeded per saltum, from the premise that the Khojas before conversion were Hindus, one or two decisions showing that in matters of succession customs analogous to the Hindu law of the joint family had been proved, and a practice on the Ecclesiastical side of the Court, presuming that in matters of succession the Khojas were governed by Hindu and not by Mahomedan law, to the very much wider conclusion that in all matters relating to property, succession and inheritance

they were presumed to be so governed till they could prove a local custom to the contrary.

Next follows in 1877 the case of *Rahimatbai v. Hirbai* (9), which was decided in the first Court by Sargent, J., and on appeal by Westropp, C. J. and Green, J. This was a sequel to the case of *Hirbai v. Gorbai* (7). Gorbai having died made a will in favour of Rahimatbai. Hirbai, the widow, claimed her deceased husband's estate. All that is important in the judgment of the first Court, for my present purpose is issue 7 and the manner in which it was disposed of. That issue was whether in matters of inheritance the Khojas were not governed by the Hindu law, unless a custom to the contrary were proved; and Sargent, J., decided that they were, merely on the strength of his own decision confirmed in appeal in the previous case of *Hirbai v. Gorbai* (7). Westropp, C. J., in giving judgment, said:

"Both of these propositions are contrary to Hindu law; and as it is now a settled rule that in the absence of proof of a special custom to the contrary Hindu law must regulate the succession to property amongst Khojas, it is clear that the burden of proving such special customs lay upon the defendant Rahimatbai who put them forward".

Thus, we see in what a sudden summary manner the law became "settled." Sargent, J., and Westropp, C. J., were responsible for the previous judgments in *Shivji Hasam v. Datu Mavji* (5) and *Hirbai v. Gorbai* (7), respectively, so that it is not surprising that they should have regarded those decisions as final. But I have pointed out above, after tracing the history of this doctrine from its origin to this stage, what were the real and the only grounds for the statement henceforward, for a time at least universally accepted, that this far-reaching question was settled. This case adds nothing whatever to the reasoning of the previous cases; it is instructive because it shows how easily case law is supposed to be settled. In none of the intermediate cases, the steps by which this conclusion was reached, with the single exception of Sargent, J.'s judgment in *Hirbai and Gorbai* (7), was any real attempt made to analyze the contents of the preceding judgments, to state them accurately and define their true scope. I have shown that every

time something was assumed to have been held, which never had been held, or that an inference was drawn from materials in themselves quite insufficient to sustain that inference. But in a small Court, where the leading practitioners remain for years, have themselves probably been engaged in most of the cases and so contributed by their arguments to the decisions, and are afterwards called on to advise on each fresh litigation, it is only natural that they should advise the use of terms appropriate to what they believe to be the law applicable. That is why in all these suits we now find the pleadings couched in terms taken from the Hindu law of the joint family.

In 1880 *In the matter of Haji Ismail Haji Abdula* (10) was decided. This was a probate case, and it was held that Cutchi Memons were not Hindus within the meaning of S. 2, Hindu Wills Act, and therefore, probate to take effect throughout India cannot be granted in the case of a Cutchi Memon testator. Cutchi Memons are Mahomedans to whom Mahomedan law is to be applied except when an ancient and invariable special custom to the contrary is established. Westropp, C. J., in delivering the judgment of the Court, said (page 460):

"We know of no difference between Cutchi Memons and any other Mahomedans, except that in one point connected with succession it was proved to Sir Erskine Perry's satisfaction that they observed a Hindu usage which is not in accordance with Mahomedan law... Under these circumstances, we must hold them to be Mahomedans to whom Mahomedan law is to be applied, except when an ancient and invariable special custom to the contrary is established."

It is a pity that the same view was not consistently held from 1847 about Khojas. Both sects were on virtually the same footing, before Sir Erskine Perry. But in the case of the Khojas, the major premise almost immediately became inverted while even in the case of asserted customs a relaxation of the general rule was permitted and carried great lengths; apparently because the Courts were uncertain whether they really were Mahomedans or Hindus.

Here we find the effect of Sir Erskine Perry's judgment so far as it touches Cutchi Memons accurately repeated, and the correct legal consequences attach-

ed to it. Yet in all modern arguments at this Bar, which I have heard, and I have heard a great many from the leaders of the profession, it has always been taken for granted that Cutchi Memons and Khojas stand in same relation to the Hindu law, and no distinction has ever been made between them.

The next case of importance is again a Cutchi Memon case, *Mahomed Sidik v. Haji Ahmed* (11), decided by Scott, J. A Cutchi Memon had made a will. It was challenged on the ground that the property disposed of was "ancestral family property" and the will was held invalid on the ground that Cutchi Memons like Hindus had no power to dispose by will of ancestral family property.

It will be convenient to quote the more material passage from the judgment as they occur. The learned Judge says (p. 9):

"The property disposed of by the wills (I should note that two wills were in dispute) consists entirely of profits made in a business started by the four brothers, Ismail, Abdsatar, Hassan and Ahmed, in 1845, under the partnership name of Haji Abdulla Nur Mahomed, their father. It is now contended that the wills deal with joint family property, and are consequently invalid, and ought to be set aside; that the estates of the two deceased brothers, respectively, should be divided amongst the two families in accordance with the rules of Hindu law First comes the general question—the parties are Cutchi Memons—what is the law applicable to that community with respect to inheritance? Is it Hindu law? Is it Mahomedan law? Or have the Cutchi Memons created for themselves by their conduct, since their conversion, a special customary law which differs from Hindu law, inasmuch as it recognizes no distinction between ancestral and self-acquired property; and from the Mahomedan law, inasmuch as it gives a man unlimited power of disposing of all his property by will? The intimate connexion between law and religion in the Mahomedan faith justifies the presumption that converts to that faith, apart from any evidence of customs which the community may since their conversion have voluntarily imposed upon themselves, would be governed by Mahomedan law. This presumption has received the sanction of the Privy Council* where their Lordships say: 'But the written law of India had prescribed broadly that in questions of succession and inheritance the Hindu law is to be applied to Hindus and the Mahomedan law to Mahomedans,' and in the judgment delivered by Lord Kingsdown, in *Abraham v.*

(11) [1886] 10 Bom. 1.

*See *Jawala Bakhsh v. Dharum Singh*, 10 M. I. A. 511 at p. 537.

(10) [1881] 6 Bom. 452.

Abraham (12). it is said that 'this rule must be understood to refer to Hindus and Mahomedans, not by birth merely, but by religion also.' But at the same time it is quite clear that, where the natives of India are concerned, usage must override the presumptions of general law in matters of inheritance amongst converts to a new religion, just as much as in other matters The principles applicable to this case therefore may be stated as follows: The general presumption is that the Mahomedan law would govern converts from the Hindu religion to Mahomedanism. But a well established custom in the case of such converts, to follow their old Hindu law of inheritance, would override that general presumption."

I pause here to point out what has often occurred to me, namely that a custom needs to be proved in each case as a custom, and that so large a custom as that of incorporating a complete, widely ramifying and highly technical branch of law bodily from another religion and law, seems to me wider than any custom which has ever been proved in any Court.

"And a usage establishing a special rule of inheritance as regards a special kind of property would be given the force of law even though it be at variance with both Hindu and Mahomedan law."

I am in entire agreement with the learned Judge so far. Condensed, what he starts with is this: the Mahomedan law must be presumed to govern the Cutchi Memons, and by a parity of reasoning the Khojas; but anyone alleging a special custom in derogation of it may prove it if he can, and, well proved, the Court will support it. Now let us see how the learned Judge applies his principle.

"Have the Cutchi Memons by their conduct shown that they retained the Hindu law of inheritance as the customary law of their community?"

I note on that again that the proposition appears to me much too wide. To make out such custom by conduct would require literally a thousand well-established instances of every feature of the Hindu law of the joint family adopted by the Memons. Not only would they have to prove particular rules of succession upon intestacies, but also the rights of the manager, rights of enforcing partition as between members: see later *Ahmedbhoy Hubibhoy v. Cassumbhoy Ahmedbhoy* (8), and to these might be added many others, each one

of which would need separate an elaborate proof.

"That question has been decided in the affirmative by a series of decisions in this Court."

These are the decisions I have already criticised, and with great respect I submit that they have not decided anything of the kind.

"Cutchi Memons appeared as litigants in 1847 . . . It was there held by Sir Erskine Perry that, as regards Cutchi Memon females, the Hindu order of succession applies, although it is opposed by that prescribed by the Quran."

I have shown that what Sir Erskine Perry did hold was that a single custom excluding daughters from inheritance was proved. That happened to be in accordance with the principles of Hindu and opposed to the principles of Mahomedan law; and that is all. The learned Judge then proceeds to discuss the materials available on the ecclesiastical side of the Court, which are much richer in the case of Memons than Khojas, and concludes from these that the Hindu law has long been recognized in this Court as governing both Memons and Khojas. Upon that I need say no more than that very few of these were contentious cases, and doubtless, in large measure owing to the opinion of the profession, it was taken almost for granted that in these matters of succession, the Hindu law did apply. But in none of these cases was any custom set up in derogation of the Mahomedan law and duly proved as required by the learned Judge's own principle.

But the learned Judge concludes this part of his judgment:

"The general principle is therefore that Cutchi Memons are governed by the Hindu law of inheritance in the absence of proof of special custom."

It is not necessary to quote verbatim from what follows. It is however of great interest as exhibiting the attitude of a very learned Judge towards the question he had to try. In the first place he throws the onus of proving a custom repugnant, not to the Mahomedan but to the Hindu law, on the Mahomedans who claimed the application of their own law. This is opposed to his own principle, and can only be attributable to the belief that the general presumption had been shifted by the former decisions, as well as particular customs established by them. There is little doubt but that, had the onus been

(12) [1861] 9 M. L. A. 199=1 W. R. P. C. 1=19 Eng. Rep. 716.

placed on the party desirous of proving a custom repugnant to the Mahomedan but consonant with the Hindu law, great difficulty would have been found in discharging it. In his criticism of the evidence Scott, J., quotes witnesses who say that the Memons are governed by the Hindu law. True, but since when? Since Sir Erskine Perry's judgment. The emphatic witness who declares three times over that the community is now under the Hindu law, which Sir Erskine Perry made for them, "Hindu, Hindu, Hindu law", was probably so vehement because he was so indignant. It is enough to repeat that Sir E. Perry never did decide that the Hindu law governed these people. He found in favour of a particular custom, a very limited custom, which no one in the community except daughters was at all likely to wish displaced. This is in all probability why Sir Erskine Perry's decision was not taken up on appeal to the Privy Council. But Scott, J., certainly thought that the evidence laid before him afforded confirmation of the view, founded on the decisions I have criticized, that Hindu law of the joint family governed these people. He next proceeds to discuss the question whether, if that were so, the Wills in suit were valid. He says:

"Their validity further therefore very much depends on the question whether the property was ancestral or self-acquired."

In the view taken so far by the learned Judge it might be thought that the validity of the Wills depended entirely, not "very much" upon the property being self-acquired. The learned Judge then proceeded to apply the doctrine of nucleus and holds that the property bequeathed was ancestral family property and therefore that the Wills were invalid.

It will be observed that this imports virtually the whole of the Hindu law of the joint family into the law of the Cutchi Memons, and is a great enlargement of any former decision. It is interesting to note that the evidence which the learned Judge heard, impressed him with the idea that the community were anxious once more to be placed under their own law. He attributes this to a recent change of opinion. He believes that they acquiesced willingly in the decision of Sir Erskine Perry and

for many years thereafter were quite content to be under the Hindu law of the joint family. I submit with respect that there is absolutely no ground for any such inference. They could hardly have anticipated that what was decided in 1847 would be stretched, as it has since been, so as not only to establish a very innocuous custom but to bring in gradually the entire complicated, and to an enterprising commercial community intensely irksome, Hindu law of the joint family. It is quite likely that they were impressed by the decision of Sir Erskine Perry and for many years did believe that the Courts had made a new law for them; but with increasing intelligence and prosperity, it is incredible that they should have cheerfully acquiesced in the introduction of so radical and far-reaching a change. They might have resigned themselves without much apprehension to all that was ever actually decided against them up to the judgment of *Shivji Hasam v. Datu Mavji Khoja* (5). That however was a *mufassil* case, and is hardly likely to have attracted much notice among lay Khojas and Memons, although in the narrow circle of the profession it was taken to have finally introduced if not the whole, very nearly the whole, of the law of the Hindu joint family into the law governing Khojas and Memons.

I have dwelt at some length upon this case, not only because the opening portion of the judgment is theoretically interesting in tracing the progress of this wide legal change by means of a series of judgments, but because it is the first, and I believe, the only case yet decided, in which the principle or supposed principle of the earlier decisions has been carried the length of invalidating a Will made by Memons or Khojas on the ground that it purported to dispose of ancestral joint family property, and by implication grafted on the law of Khojas and Memons the most dangerous and injurious of all the features of the Hindu law of the joint family, the doctrine of nucleus.

I should have mentioned, keeping strict chronological order, the case of *Ashabai v. Haji Tyeb Haji Rahimtulla* (13), decided by Sargent, C. J. The learned Judge says (p. 120):

(13) [1885] 9 Bom. 115.

"The first question of importance which presents itself for decision in this case is as to the law of inheritance applicable to Cutchi Memons, to which caste the parties interested belong. The ecclesiastical records of this Court show that Khojas and Cutchi Memons have, ever since the decree in the case of the 'Khojas and Memons' before Sir Erskine Perry. been regarded in the Supreme Court and subsequently in this Court as Hindus who had been converted to Mahomedanism whilst retaining their Hindu law of inheritance; and, so far as Khojas are concerned, the decision of the Court of appeal in the case of *Hirbai v. Gorbai* (7) must be taken as conclusively deciding that the onus of proving a custom of inheritance not in conformity with Hindu law lies upon those who set it up. The above records are even richer in instances of the application of Hindu law of inheritance to the estates of Memons than to those of Khojas, and establish a non-contentious practice extending over many years. I think, therefore, that in the absence of any special ground of distinction, and none was suggested, no sufficient reason exists for placing Memons on any different footing from Khojas as regards the application of the Hindu law of inheritance in the absence of proof of any special custom, although undoubtedly it leaves the law, as pointed out by the Chief Justice in the above case of *Hirbai v. Gorbai* (7), in an incomplete state, which can only be satisfactorily dealt with by express legislation."

and proceeds to apply the Hindu law, texts and all, to the facts of this family, found in the case. Now, I note first the use of the word "caste" again as though the Memons really were Hindus. Next, it scarcely needs to be pointed out that this judgment is difficult to reconcile with that of Westropp, C. J., *In the matter of Haji Ismail Haji Abdulla* (10) decided five years previously. There the learned Chief Justice was clearly indisposed to assent to the proposition that the Memons were so far shown to be under any other law than the ordinary Mahomedan law with the single exception of the custom proved in derogation of that law in 1847. Nothing, as far as I can ascertain, had occurred in the interval to warrant any departure from or modification of the opinion then expressed by Sir Michael Westropp. Yet both in this case and in that of *Mahomed Sidick v. Haji Ahmed* (11), it appears to have been neglected. And once more, as regards the Memons, the sweeping conclusion, that they are in all matters of inheritance governed by the Hindu law of the joint family, is chiefly based upon non-contentious matters coming before the Registrar of the Ecclesiastical Side

of the Court, and partly upon the fact that the Supreme Court and after it the High Court had ever since 1847 regarded Memons and Khojas as converted Hindus who had retained the whole of Hindu law of succession, and apparently along with that, that of the joint family. For here Sargent, J., goes back to the time, when the grandfather was living with his son who predeceased him, and speaks of them as constituting a joint undivided family. He refers also to a projected partition which fell through and cites the *Mayukha* as governing the resultant rights of property of the members of the family. As far as I can gather from the report, the main claim of the women, plaintiffs, was utterly inconsistent with the Hindu law, but it is not necessary to pursue that further.

I come next to the case of *Ahmedbhoy Hubibbhoy v. Casumbhoy Ahmedbhoy* (8), decided on appeal by Sargent, C. J., and Bayley, J. This suit was instituted by Chassimboy, the son of Ahmadbhoy Habibbhoy, for partition. The first Court decreed it. This decision was reversed on appeal, and I will deal critically with that very important judgment. First, let me note that the trial Judge threw the onus of proving a custom in derogation of the Hindu law of the joint family upon the defendant. This was very natural in the light of the decisions I have just been dealing with, particularly *Ashabai's* case (13). Sargent, C. J., says p. 540:

"Now it is to be remarked that the rule of this Court, to which Sir M. R. Westropp refers in the last case, [*Hirbas v. Gorbai* (7)] is based on a dictum of Sir Mathew Sausse in *Gangbai v. Thavar Mulla* (3) and the practice which had prevailed during the previous twenty-five years in granting Letters of Administration to the estates of deceased Khojas which is particularly referred to in the judgment of the Division Court in *Hirbai v. Gorbai* (7). The dictum of Sir Mathew Sausse, that "the Khoja caste had been held to be governed by Hindu customs and laws of inheritance," must have been based on the practice of granting Letters of Administration to Khojas prior to 1863, when *Gangbai v. Thavar Mulla* (3) was decided; for besides the case before Sir Erskine Perry in 1847, which certainly did not lay down any such rule, the question would appear to have never arisen except on the ecclesiastical side of the Court. So far, therefore, as the rule is confined to the simple question of inheritance, and succession as to which the law books present no difficulty, it would appear to be based on a long established practice of the Court of applying Hindu

law in the absence of proof of custom to the contrary, which might well justify the onus being thrown on the party alleging such custom, of proving it."

Surely this indicates a marked backward swing of the pendulum from the same very learned Judge's attitude revealed in the case of *Ashabai* (13), decided four years earlier. It may be conjectured, with all proper respect, that Sir Charles Sargent, now Chief Justice, who almost alone had never once misconceived or permitted any extension of what really was decided in *The Khojas' and Memons'* case (2), began to doubt whether the subsequent series had not carried the law much too far. At the same time, as I shall have to show when I have done with the cases, it is extremely difficult, if not impossible, to dissociate the Hindu law of "succession" from all that is inextricably bound up with it, by way of antecedent, in the general Hindu law of the joint family. I doubt myself whether it is possible or whether the distinction sought to be made in the case now under discussion between "simple" succession and such points as were dealt with by Scott, J., and for the matter of that by Sargent, J., himself in *Ashabai's* case (13), can be practically maintained.

The ground of this distinction taken by the learned Chief Justice is however very clear. Briefly it is this: the right of the son, under the Hindu law, to demand a partition of joint family property during his father's lifetime, particularly when the bulk of that property is moveable, has always been uncertain and much debated among jurists right up to the decision of *Jagmohandas Mangaldas v. Sir Mangaldas Nathubhoy* (14). It is extremely unlikely that in or about A. D. 1400, the Hindus, who were converted and became Khojas, had any definite ideas about it. It cannot therefore be presumed that they carried that feature of the present Hindu law with them into their new faith, and it lies on the party alleging, that it is the custom of the Khojas that a son has the right to demand partition from his father, to prove it. This was held in fact not to be a question relating to succession or inheritance at all. Further on, in his judgment, the learned Chief Justice says:

"It is true that the witnesses go even so far as to say that there is no distinction between ancestral and self-acquired property as regards alienation by the father, but without being able to cite any instance of a Khoja alienating ancestral property, by will or otherwise, away from his sons, but however that may be, the right of the sons to object to alienation by their father is quite consistent with their having no right to demand partition of ancestral property during his life, which is the only point now for consideration, and which affords the only reasonable explanation of their submitting to be turned out without any share."

With great submission, it may be doubted whether such a right as is here hinted at, and which is almost certain to give rise to much litigation, is not inconsistent with the absence of any right to demand partition. It is clear that the latter is opposed to the Hindu law; while the former could only be upheld on the supposition that the Hindu law applied. The one is indeed a complementary right of the other. It is because according to the principle of the Hindu joint family, every son takes an interest at birth that he is entitled as against his father to demand partition, and similarly to prevent his father independently alienating any part of the joint family property, in which ex hypothesi the son has his own right. It would be strange, indeed, on the supposition of conscious selection, which has to be here introduced in place of the older theory that as Hindus they unconsciously, so to speak, carried the whole of their former law with them, these communities should have adopted the right of the son to prevent his father alienating any part of the joint family property, but should have rejected the right of the son to demand partition of it. Sargent, C. J., proceeds:

"Nor, indeed, is it to be wondered at that the custom should be different in Bombay from what it is stated to have always been in Kathiawar and Cutch. Since the Khojas have settled in Bombay, which is said to have been for the last hundred years, they have engaged in commerce, and greatly increased in wealth. From being cultivators of the land with very limited personal property, they have become active and energetic merchants, contractors, and men of business, and it was only to be expected that under these circumstances, such a custom as is stated to have existed in Kathiawar, would in course of time undergo modification. Such would naturally be the wish of the leading men of the community who had accumulated capital, and would gradually under their influence permeate the lower strata of the body corporate until the old usage would gradually fall into desuetude, and the strict right of

(14) [1886] 10 Bom. 528.

the son, if it ever existed, be lost with the approval of the general community."

I submit again that all this applies with at least equal force to the possible right of a son to prohibit his father's alienations, and with much greater force to the introduction of the devastating doctrine of nucleus. I am not surprised that the witnesses in this case refused to recognize any distinction among Khojas between ancestral and self-acquired property. Yet in *Mahomed Sidick v. Haji Ahmed* (11), the burden of proving this as a special custom was thrown upon the party so alleging, and the Court held that he had failed to discharge it. As I said before, had the burden been placed upon the other party, what occurred in this case only a few years later fully bears out my anticipation that it in turn would not have been discharged. What can be more continually oppressive, harassing and vexatious to a prosperous businessman than the reflection that he will not be permitted to dispose of his life's earnings by will because in his childhood he was nurtured and trained for business in his father's home and little village shop. Yet that is the effect of the decision of *Mahomed Sidick v. Haji Ahmed* (11).

In *Abraham v. Abraham* (12), the Privy Council pointed out that usages are not independent of volition, and may, unless their continuance is enjoined by law, as they were adopted voluntarily, be also changed or lost by desuetude. Now, in the case of these Khojas and Memons, so far from the customs already legally enforced by our Courts, and of which further extension in every direction is always being attempted, being enjoined by, they are directly opposed to, their law. And it is certain, as appears clearly enough from the dicta of most of the eminent Judges whom I have been quoting, that as far back as 1880, it was generally felt that if the will of these communities could be consulted, they would throw off all connexion with the Hindu law. Unfortunately for them, the Court took the matter out of their hands, and stereotyped a custom here and there, while giving colour to the very much larger proposition that the Hindu law was to be presumed to apply, not this or that custom, be it reiterated, but the whole Hindu law, in matters of succession and inheritance. But for the

decisions following upon *The Khojas' and the Memons'* case (2) of 1847, no one who has any knowledge of the subject or the sentiments of the leaders and representatives of these sects could doubt that nothing would be heard today of any custom tending to bring them collectively under the bondage of the law of the Hindu joint family. Sir Charles Sargent's comments on the contemplated legislation of 1878 are strikingly suggestive, indeed, I think conclusive, on this point. The Court, having held that the plaintiff had no right to insist upon a partition, went on to consider whether the defendant's wealth was traceable to a "nucleus," thus again by implication importing that special feature of the law of the Hindu joint family into that of the Khojas. These obiter dicta, very unfortunate obiter dicta I cannot help thinking, together with the other obiter I have cited ante, suggesting that a Khoja son had a right to prohibit his father alienating the joint property, bore their natural fruit. In the case of *Ahmedhoy Habibhoy v. Sir Dinshaw M. Petit* (15), which I tried, although the actual prayer was for specific performance of a contract for sale, the plaintiff made the most desperate attempts to get a side decision from the Court that his property was his own, and that his sons had no right to it on the footing of a Hindu joint family. That question could not properly be decided in that suit. Shortly after, another indirect attempt was made by way of a summary suit under the Specific Relief Act to get the same question answered. But it is still open and will inevitably give rise to enormously expensive and protracted litigation on the death of Ahmedbhoy, which must, in the ordinary course of nature, soon occur.

In an insolvency matter, *In the matter of Haroon Mahomed* (16), decided by Sargent, C. J., and Scott, J., the parties were Cutchi Memons. The question was whether one alleged member of a partnership was to be adjudged insolvent. The firm as a firm had been so adjudged and none of the other parties objected. The matter seems to have been tried on affidavits. Sargent, C. J., said:

"As Cutchi Memons, the rules of Hindu law and custom apply to them, and the posi-

(15) [1903] 3 I. C. 124=11 Bom. L. R. 545.

(16) [1893] 14 Bom. 189.

tion of the appellant with regard to the family property must be determined by the same considerations as would apply in the case of a member joint and undivided Hindu family."

This once more brings the Cutchi Memons under the entire law of the Hindu joint family and appears to me with respect, irreconcilable with what the same learned Chief Justice had laid down in *Ahmedbhoy Hubibhoy v. Cassumbhoy Ahmedbhoy* (8), where the presumption was carefully restricted to matters of succession and inheritance. True that was a Khoja case but looking to the whole current of decisions if any distinction can be made at all it would, I think, rather be in the direction of exempting the Memons to a greater extent than the Khojas from the law of the Hindu joint family. The Chief Justice goes on :

"The firm, then, was a family firm, and was the property of a family subject to Hindu law."

But it is certainly astonishing to find the learned Chief Justice, who had so very recently set himself to strike out "property" from the rule that Khojas and Memons are subject to the Hindu law in all matters "relating to property, succession and inheritance" now laying down the law more broadly and in more unqualified terms I think, than ever before in the opposite direction.

I may conclude this review of the case law by referring very briefly to the decisions of Ranade, J., which have the effect of bringing two more groups of Mahomedans, under the Hindu law whether partially or completely I will not stop to inquire. In *Bai Baiji v. Bai Santok* (17), it was held that the Sunni Borahs of Dhandhuka were governed by the Hindu law in all matters of succession and inheritance. Ranade, J., said :

"The following principles may now be regarded as settled: (1) Mahomedan law generally governs converts to that faith from Hinduisim but (2) a well-established custom of such converts following the Hindu law of inheritance would override the general presumption. (3) This custom should however be confined strictly to cases of succession and inheritance. (4) If any particular custom of succession be alleged which is at variance with the general Hindu law applicable to these communities the burden of proof lies on the party alleging such special custom."

The decision of *In the matter of Haroon Mahomed* (16) shows how very much further the Courts have actually

gone in practice than this cautious statement of principle would have warranted. Ranade, J., says :

"The appellant's counsel very properly urged that the burden of proving that a community of people professing the Mahomedan faith were not governed by the Mahomedan law of succession but by the usages and customs of the old Hindu faith to which their ancestors belonged rested on the defendant. At the same time we do not think he was right in maintaining that this usage or custom should be proved in regard to the particular relationship which the parties to the present suit bear to one another. If the evidence is clear on the point of the general prevalence of the Hindu rules of succession in preference to the rules of Mahomedan law, the burden of proof will be discharged and it will then be for the appellant to show that this particular relationship was excluded from the sphere of the proved general usage of the community."

This brings out very clearly a point taken in an earlier part of this judgment and I submit that the dictum of the learned Judge is open to question. I do not see why any distinction should be drawn in these cases merely because the parties happen to belong to a particular religion and be under a particular law. Where it is said that a custom drawn from another religion and law obtains among them, a custom is set up in derogation of the general law, and, in my opinion, it is that custom which the party alleging it is bound to prove. I think that the inquiry ought to be restricted to the proof of that custom and not opened upon so wide a ground as the proof of the adoption of a whole body of alien law, which really never is proved or attempted to be proved and always starts from general premises, reasoning from which may or may not include the particular custom alleged. It is due to this method of dealing with the cases, that bodies of Mahomedans have so facilely been adjudged to be generally governed by the Hindu law of succession, inheritance and the joint family, chiefly upon the undisputed fact that before conversion they too were Hindus. All the facts which are usually put first in this process of proof and are usually taken to warrant the conclusion by inference upon the particular point to be determined, a custom of which in this method of treatment no proof at all need be given, ought, in my opinion, to be merely adduced as ancillary to and corroborative of what other direct evidence pro-

ving the alleged custom may be forthcoming. Had that method been followed, it is doubtful whether the conclusions which have been arrived at in some cases would ever have been reached.

The learned Judge then proceeds to enumerate all the cases I have dealt with, without critically examining any of them, but as a result, he draws the principles which I have quoted above. These I have shown to be very different from what in practice has been assumed to be the result of the cases, as they developed, I think I might correctly say evolved, the one out of the other. The learned Judge then goes on to state that the question which had to be answered first was whether this group of Mahomedans occupied the same position and status as the Khojas and Memons. It is to be noted that this was a claim by a daughter under Mahomedan law, and that the oral evidence alone, taken with the long list of decrees mentioned by the learned Judge, would have been amply sufficient to establish the custom relied on by the defendant that among these Mahomedans a daughter was excluded without any necessity of going further and laying it down generally that this community had adopted the whole Hindu law of succession. It is extremely probable that in the case of daughters, such a custom [which was exactly the same as that upheld in *The Khojas' and Memons' case* (2)] has grown up and long been observed among the Mahomedans of that part of the Presidency.

Another judgment in the same volume, *Makarana' Shri Fatesangji Jasvantsangji v. Kuvar Harisangji Fatesangji* (18), similarly extends the Hindu law of succession and inheritance to the Mole-salam Girassias of Guzerat. This suit comes from Broach; it was decided by Ranade, J., shortly after the case last noted, and many of the materials were the same; the parties were originally Rajputs. The plaint raised a very simple narrow point, namely, whether the plaintiff was entitled to khoraki poshaki (food, dress and maintenance). That is a custom not, with submission, any more a part of the general Hindu than of the general Mahomedan law. And it would have been enough to put the party alleging it to the proof of it. This would (18) [1893] 20 Bom. 181.

have been in strict accordance with the learned Judge's own principles deduced in *Bai Baiji v. Bai Santok* (17) from all the preceding decisions. But the course followed was the common course. First, it was proved to the satisfaction of the Court that the parties, although Mahomedans, had adopted the entire Hindu law of succession, etc., then the onus of proving a custom inconsistent with or opposed to the Hindu law was thrown on the defendant. Jiwai, khoraki poshaki, etc., are all incidents of state tenure where the Raj itself is impartible. I should hesitate to say myself that they are any more opposed to the Mahomedan than the Hindu law. Mahomedan States throughout Kathiawar and Rajputana, I believe, observe these customs. But the learned Judges in this appeal were of opinion that these appanages were part of the Hindu law, as modified in cases of impartible estates, and therefore threw the burden of proof on the defendant. Again I say the decision was reached by what, it is respectfully submitted, was a wrong path, and goes far beyond the scope of the actual controversy, deciding much more than was needed to dispose of the particular claim.

This review of the case-law is necessary in order to come to a decision upon the question how far the Hindu law of the joint family governs Khojas in this Presidency. For it is obvious that if it does not govern them the plaintiffs in this suit have no cause of action. Every one of the reliefs sought is founded directly or indirectly on the Hindu law of the joint family. And the difficulty, which always confronts a Judge of this Court in such cases, a difficulty which is daily growing, is to draw a line, if possible, between "succession and inheritance" and the complete Hindu law of the joint family. The late Russell, J., is credited with the witty epigram that under the existing law of this Presidency, Khojas and Memons are to all intents and purposes live Mahomedans but dead Hindus. If that correctly represented the effect of the decisions, it would be very easy to administer the law, and its administration on those restricted lines would not give rise to much just complaint. Unfortunately, there has been a steady tendency, clearly marked in the most

recent cases, to substitute the general presumption that the Hindu law, for the natural and older presumption that the Mahomedan law, governs these groups of Mahomedans, and to make that presumption the starting point of each inquiry. I think I have conclusively demonstrated that the principles which the later cases purport to enforce cannot, really, be found, apart from rather sweeping generalizations, in the cases from which they are said to be derived. So far as the Khojas and Memons are concerned, three customs have been held proved, two in agreement with and one opposed to the Hindu law, and all these customs belong properly to intestate succession. These are : (1) that daughters do not inherit as they would under the Mahomedan law. (2) That the brothers of a deceased person or his kindred (reversioners ?) are to be preferred to the widow—this may be taken to be in accordance with the Hindu law if it be assumed further that the family was joint in the sense of a Hindu joint family but not otherwise ; (3) that a mother is to be preferred to a widow for purposes of administration. Leaving aside the Broach and Dhandhuka cases decided within a few months of each other, by Ranade, J., where in both cases the point actually in dispute was really decided upon proof (or supposed proof) that the groups concerned had adopted the whole Hindu law of the joint family, these are the only customs which have been held proved amongst Mahomedans in this Presidency as far as I know, certainly the only customs proved amongst Khojas and Memons in derogation of the Mahomedan law. And from the first case to the last, when the learned Judges turn back to first principles, we find a reiteration of the proposition that where Mahomedans are concerned, the Courts are to start with the presumption that the Mahomedan law governs them. So that but for the constant references to "traditional doctrines" of the Supreme and High Court on its ecclesiastical side, which is supposed to have established the further proposition that Khojas and Memons are governed by the Hindu law (not by any particular feature of it adopted as a custom) in all matters of succession and inheritance, it would

appear that there was scant ground indeed, and that but treacherous, for the superstructure of case-law and resultant consensus of professional opinion, which today combine to render it a doctrine accepted and hardly even challenged, that to this extent these groups of Mahomedans have renounced their own, in favour of the Hindu law. But the decisions go much further. For while I do not think that in any case which is regarded as an authority, and so made a fresh starting point, there is to be found as a statement of recognized and settled principle, more than this, that in succession and inheritance, I omit the word "property" only found in Sir Michael Westropp's judgment in *Shivji v. Datu* (5), the actual decisions cover almost the whole field of complicated law which is the Hindu law of the joint family.

Thus it has been decided that a Cutchi Memon cannot dispose by will of "ancestral joint family property," although it is clear that at the time the will was made, no question of succession and inheritance had been opened nor can the quality of the property really come in question, during the lifetime of a Mahomedan under his own law, as necessarily referable to two opposed categories, ancestral or self-acquired. It is true that the learned Judge who decided that case took evidence (but after, as is now submitted with all deference, throwing the onus on the wrong party) of a custom amongst Memons under which no distinction is made between ancestral and self-acquired property. But if the learned Judge had kept his own stated principles in sight, and I think it out to be presumed that he did, he could only have taken that course upon the supposition that the distinction between ancestral joint family property and self-acquired property was included under the terms "succession and inheritance." The whole Hindu law of the manager was introduced, without any evidence of custom by the judgment of *Shivji v. Datu* (5), presumably because at that time the learned Chief Justice believed to have been already established and so to have become a part of the law of the Presidency, that the Hindu law of joint family property must in each case now be presumed in the absence of custom

to the contrary to govern Khojas and Memons. In the concluding part of the judgment of Sargent, C. J., in *Ahmed-bhoy Hubibbhoy v. Cassumbhoy Ahmed-bhoy* (8), in spite of having declined to admit so broad a proposition without qualification, and after having refused to apply the Hindu law in one very important point to these Khojas, we find the whole argument proceeding upon the assumption that the Hindu law of the joint family is applicable. The nucleus doctrine is taken for granted as having been engrafted with the rest of the Hindu law of succession and inheritance upon the law of Khojas and Memons. And at last in *Haroon's* case (16) we find Sargent, C. J., himself giving judgment upon the basis of the parties being governed by the Hindu law of the joint family, in an insolvency matter, which, viewed in any light, could hardly fall within the principle so frequently and carefully enunciated by that very learned Judge himself in previous cases, that the presumption went no further than matters of inheritance and succession. Here a firm carried on by four Cutchi Memon brothers was treated exactly as though they were a joint and undivided Hindu family and the firm a joint family asset. Never has such a custom in derogation of the Mahomedan law been set up, as far as I know, much less proved; and it can only be upon the assumption that an entire system of law can be adopted as a "custom" and that the entire Hindu law, not only of succession and inheritance, had been so adopted and proved to have been adopted by Khojas and Memons, that the judgment in this case is intelligible.

In the last case decided by Sir Michael Westropp, however, that most eminent Judge, so far as Cutchi Memons are concerned, went right back to the original (and I submit with great respect the correct and only correct) starting point. He refused to recognize any established general distinctions between these and other Mahomedans and, excepting the single custom proved up to that time, the exclusion of daughters from the inheritance in 1847, declared emphatically that any other custom alleged in derogation of the general Mahomedan law must be proved strictly by the person alleging

it. I cannot help thinking it much to be regretted that the learned Judge, who decided *Mahomed v. Haji Ahmed* (11) a few years later, did not guide the proceedings by the principles thus emphatically laid down by Sir Michael Westropp.

At the same time, I own that I find it very difficult to say precisely where the Hindu law of succession and inheritance can be separated from the rest of the Hindu law of the joint family. At present the Memons and Khojas, taking them together, are in this peculiar and most undesirable position. They are presumed to be governed by the Hindu law in all matters of succession and inheritance; but in all other respects they are presumed to be governed by the Mahomedan law. It has been definitely decided: (1) that among them daughters are excluded from the inheritance and are entitled to no more than maintenance and dower; (2) that the relatives of the deceased husband take in preference to the widow (this leaves a wide door open for further complicated and expensive litigation, and is utterly inconsistent with what appears to have been often taken for granted in the arguments and criticism of the evidence that a widow can dispose of her husband's property by will; (3). That a mother is entitled to administer before a widow, referable to known principle and resting upon a proved custom only; (4) that a son cannot enforce partition against his father, (consonant with no known law), but (obiter) that he may prohibit his father alienating the joint family property, again a wide door open to the most protracted and expensive litigation; (5) (More or less obiter) that the nucleus doctrine of the Hindu joint family governs Khojas and Memons, which is, I think, the most disastrous feature in any of the decisions not referable certainly to the "established principle" that the Hindu law of succession and inheritance governs these people; (6) that the law of the manager in a joint family, under the Hindu law, governs Khojas and Memons; (7) that in every respect the law of the Hindu joint family governs Khojas and Memons where members of a family are found to be living and trading together: *Haroon's* case (16). No wonder these communities are growing restive and

dissatisfied. The whole law needs the most careful revision, and should, in my opinion, wherever possible, and it has shown a tendency to extend the operation of the Hindu law of the joint family to these groups of Mahomedans, be once more confined with the narrowest limits the cases allow. Can it be said that the radical distinction made by the Hindu law of the joint family between joint family and self-acquired property be wholly separated and kept apart from what Charles Sargent called a simple law of succession and inheritance? If it can, and if so long as the head of the family is alive, he can, under the Mahomedan law, dispose of the whole of the property by gift *inter vivos* or by will to the extent of one-third, some part at least of the hardship, which has been inflicted upon these groups of Mahomedans by case-law, might be remedied. But it would be the greatest part. For in every case of an intestacy, the question, now to be answered with reference to the Hindu law would surely be raised whether the property was joint family or self-acquired, involved in which would be the endless quest after the original nucleus. Consider what this means. Take the case of Ahmedbhoy Hubibbhoy for example. As soon as he dies, litigation is almost certain to be set afoot, and the Courts will be asked to go back more than a century, inquiring into the affairs of a dozen or more partnerships, ripping open hundreds and hundreds of ancient accounts, seeking information as to the state of the family fortunes at the date of the death of Ahmedbhoy's father and very likely his father before him. Again there is a probability, to say no more, of masses of litigation to prevent Khoja and Memon fathers dealing with their wealth as they please.

As the law stands no one dare to buy real estate from a Khoja or Memon unless all his children join in the conveyance, for it is impossible to say what, if any, title the father has to give. Similarly, on a minor point trouble has already arisen and is likely to increase until this branch of the law is brought into something like consistency and definiteness made referable to some plain principle of universal applicability, and not as at present left in something very

like legal chaos. I mean alienations by an adult member of a Khoja or Memon family, not himself the head for the time being of that family. Under the Mahomedan law such a case would present no difficulty, but under the law governing these peoples at present, it is virtually impossible to say what may happen. Such a case actually came before my brother Macleod a short time ago. The alienee long after the alienation brought a suit for "partition" and claimed to have the "share" of his alienor made over to him. As a Mahomedan the assignor would have sold not more than a *spes successionis*, and the transfer would have been invalid. But it is very different under the Hindu law. A member of a joint undivided Hindu family may alienate his "share" and the Courts appear to have held that the alienation operates in law as a severance of the joint tenancy.

This curious doctrine is, I suppose, imported bodily from the English law of joint tenancy, to which except in the employment of the term "joint" the Hindu law of the joint family offers no single point of correspondence, is indeed diametrically opposed to it. This I have laboured to demonstrate on more than one occasion since I have been in this Court. Logically, I contend (and with great respect to the current of authority against me, shall always feel convinced) the alienation by a member of a joint undivided Hindu family passes nothing until the alienee effects a partition by suit. I see no objection to his being allowed to do this, provided he does it during the life of his alienor, for so long he is entitled to all the legal rights of the alienor including the right to partition. But as soon as the alienor is dead I am unable to see upon what principle of law or reason the alienee has anything left to sue for. For *ex hypothesi*, the share which was alienated has ceased to exist, has gone over by survivorship to others who do not take through the alienor and are not answerable for his debts. I mean in the case of any three Hindu brothers holding joint family property, one alienates his share. The alienee does nothing. In a year, the alienor dies. Next year the alienee sues for his share and the law well settled in this country is that he is entitled to revive the dead

man and take his share by partition from the other two brothers who have received no part of the consideration. This I repeat appears to me, with great submission, neither good law nor good reason. Still for the present, it is the law and results in most complicated problems. The alienor might at the time of the alienation have been entitled on partition to, say a third, but by the time the alienee sues, he may be entitled to partition to no more than a 16th; what has the alienee taken in law? The case before Macleod, J., presented difficulties of that kind, but was settled by consent. Its importance lies in this: that no one in the course of the argument for any of the numerous parties interested, nor the learned Judge himself, ever appears to have doubted but that the Hindu law applied and governed the case. But does it? Is this in reality a case of succession and inheritance at all? It is nothing short of a case of the complete Hindu law of the joint family in one of its most perplexing forms. And if the course taken at that trial be correct and the consent decree correct (which I take leave with respect to doubt) what becomes of *Cassimbhoy's* case (8)? For here any Khoja by merely alienating his "share" in the estate, can bring about an immediate partition at the instance of the alienee. But Sargent, C. J., declared that the son had no right to partition in his father's lifetime. No case has as yet occurred, I believe, in which the right of Khojas and Memons to insist upon a partition *inter se*, I mean in the case of, say, six brothers, has yet arisen. And this points very plainly to some radical difference between their understanding of their own law and the large assumption which the Courts have made for them that in all matters of succession etc., they are governed by the Hindu law. If left to themselves, and admitting that they would not adhere strictly to the Mahomedan law, they would probably in every such case divide the patrimony between the surviving sons, who would not regard themselves as constituting a joint family in the Hindu sense. *Haroon's* case (16) decides that they are a joint Hindu family whatever they may think to the contrary, but that case goes much further than any other, and it is plain from *Haroon's* own petition that he at

least did not much believe in the applicability of the whole law of the Hindu joint family to himself and his brothers. I will say for myself, upon a long experience particularly in those districts whence most of the evidence, when a custom was alleged, has been drawn as well as from a study of that evidence so far as it appears in the reported cases, that I do not believe that the modern Khojas and Memons have ever formed among themselves "joint families" in the Hindu sense.

I am pretty confident that there is not a family of importance to be found among these sects in Bombay, which, could a complete examination be made, would not soon show marked and radical divergence from the Hindu theory. Those divergences would be less marked no doubt, among the poorer classes, living chiefly by agriculture in Guzerat and Kathiawar, but I do not doubt they would still be easily traceable. The custom of giving a son "his share" and letting him go, need have nothing to do with the rigid Hindu law of the joint family. The notion that a son is entitled to a portion is common amongst almost all peoples and is a very different notion from the vested equal right taken at birth by every male born into a joint Hindu family. But what I would most emphatically protest against is the application of that part of the Hindu law of the joint family which deals with self-acquisitions and distinguishes them from joint family property. The nucleus doctrine is, I believe, inseparable from that part of the Hindu law, notwithstanding the very great lengths it has sometimes been carried. For it is strictly logical, if regarded in a practical light, extremely unreasonable and unjust. And amongst progressive Hindus who are likely or think themselves likely to make fortunes of their own, I am sure the feeling would be as strong against it, but for the veneration in which they hold their law because it is rooted in their religion, as amongst Mahomedans who have no such reason for I will not say venerating but tolerating it. Such Hindus would, I expect, be found to have taken steps comparatively early in life to protect themselves and their earning against the application of this paralyzing doctrine by effective partition or releases.

But the Khojas and Memons, who really do not know whether, as the law stands they are exposed to this peril or not, cannot so protect themselves. Under their own law, which may for all they know govern them here, the releases would be waste paper. Of course, they could effect partitions, but where the father knows perfectly well that starting on an inherited capital, say a nucleus of Rs. 500 he has entirely, by his own unaided skill and exertions, accumulated a fortune of twenty lakhs before any of his sons were of an age to give him any assistance or be more than a cause of expense to him, it is not surprising that he should be reluctant to invite the equality of sharing, implied in every partition under the Hindu law of the joint family. Neither can he make a Will with any confidence that it will not be set aside, as in *Mahommad's* case (11) on the ground that the whole of his fortune is traceable to its "nucleus" and must therefore be regarded as joint ancestral family property. It is hardly to be expected that in the prime of life he will give away the whole of his property, seemingly the only means by which he can assert his individual ownership at all effectively. So things are allowed to drift until on the father's death, a bounteous harvest of litigation is reaped. That this state of affairs is indefensible and calls aloud for remedy, no one who is competent and acquainted with the subject is likely to deny. Both Sir Michael Westropp and Sir Charles Sargent are quite sensible of the inconveniences, to use no stronger term, to which the case-law has exposed these industrious, energetic and successful people. But nothing is done, and nothing seems ever likely to be done, as long as each case follows (and usually enlarges the scope of) those which have gone before. The most eminent Judges have advocated legislation. Why? Because they know and feel that in the existing state of the law, it imposes limitations and real hardships on the sects so brought under it which grow more and more intolerable. My examination of the case law however shows that, rightly understood and analyzed, it need never have gone the length to which here and there it has been thought to be driven. But I am not hopeful at this late hour of getting un-

done by judicial decision what has so effectually been done by means of the same instrumentality over the last three-quarters of a century. But I see no reason why an evil, now generally recognized as such and seen to bulk larger and larger over the commercial activities of these sects, should not be, at any rate, very substantially reduced and henceforward kept strictly within bounds until legislation comes to our aid, without really transgressing any of the principles established by judicial decisions. Doubtless, it would be necessary to neglect the dicta, even the decisions in some later cases inasmuch as those dicta and the decisions which flow from them are professedly based on what has preceded, if it can be shown that they are to some extent ill-founded and go far beyond what they aim at enforcing. I do not think it would be any violation of the respect due to the decisions of eminent Judges, and the venerable maxim *stare decisis*, to neglect them in future.

And yet it needs but little alteration or addition to convert the law as generally understood to govern Khojas and Memons, so that it would be robbed of its most objectionable and questionable features, and would probably be acceptable to the intelligent portion of those communities. And I believe that this can be done without violating any principle to be found in any of the decisions. I would suggest that the proper way to approach every question of the kind is this :

1. Where Mahomedans are concerned the invariable and general presumption is that they are governed by the Mahomedan law and usage. It lies on a party setting up a custom in derogation of that law to prove it strictly.

2. But in matters of simple succession and inheritance, it is to be taken as established that succession and inheritance among Khojas and Memons are governed by the Hindu law "as applied to separate and self-acquired property."

The words between inverted commas would take the whole sting out of the case-law and effectually prevent its further extension in all directions upon the basis of the Hindu law of the joint family having been established to be

the law of Khojas and Memons. It is indisputable that that never has been established as a custom adopted by these sects ; no attempt indeed to prove it collectively as a custom has ever been made, nor I should imagine, could be made in a given case, without a disproportionate expenditure of time and money. The mischief, I feel so deeply and have attempted to bring into clear relief, is attributable to the sudden inversion of the major premise, where any point proper to a Hindu joint family has been directly or indirectly in controversy. The decisions have not proceeded step by step as upon every statement of principle in every one of them they were bound to do, thus proving gradually the adoption as a custom of this or that point of the law of the Hindu joint family. The process has been reversed, and from the proof of two customs supposed to be drawn from that large and complex law, the Courts went per saltum to the conclusion that the whole law with all its legal incidents and consequences had been proved as a custom to govern Khojas and Memons. I have endeavoured by a logical analysis to expose the viciousness of this process of reasoning. And I hope that I have succeeded. If I am right the result at the present day would be this that no question at all could be made of nucleus or joint family property or the illegality of disposing by will of ancestral property, unless the person alleging any or all these points was prepared to prove that they had been adopted as a part of the customsry law of the Khojas and Memons. And it is, I believe, certain that any attempt of that kind made today would be foredoomed to failure. Whatever may or may not be the customary law of rural Khojas and Memons in Cutch, Kathiawar and Guzerat, few indeed of those wealthy trading communities in the town and island of Bombay would be ready to support any such customs. And admitting for the sake of argument that a century ago, when for the most part the Khojas and Memons in Bombay were petty hucksters, they had brought with them from their seats in the remoter parts of the Presidency customs of that kind, those customs must long since have fallen into desuetude with the growing accumulation of personal wealth. *Abraham v.*

Abraham (12) is an authority, were any needed, for the right of individuals or groups thus to abandon as well as to adopt customs, when in the former case those customs were found to be detrimental to their individual or social welfare.

If this Court were to accept this view for the future, the administration of the law would be immensely simplified, reduced from chaos to order, and a stop put to a great volume of the most protracted and expensive litigation. Applying my principles to the present case for example, it will be seen at once that the plaint discloses no causes of action at all, unless the plaintiff alleges and is prepared to prove two or three salient features of the Hindu law of the joint family as customs adopted by the Khojas of Bombay. Even as it is, many of his prayers are, on the face of them, bad. He cannot, for instance, have the declaration he asks as to the nature of the property and his rights therein ; he cannot sue for partition ; he might possibly ask to have the gift by Datu in 1902, to his son Ismail annulled on the analogy of Art. 126, of the Schedule to the Limitation Act, and the general principle of the Hindu law prohibiting alienations of joint family property by the father. But even there it appears to me that the question does not really arise upon any plea of simple succession and inheritance, and is therefore beyond the true scope of the cases. So that here again we would have to allege and prove the special custom. But there is no allegation of custom and no attempt has been made to prove a custom. Under the Mahomedan law he would have no right, I apprehended, to sue for cancellation of the release of 1879. Nor under the Hindu law properly restricted to matters of succession and inheritance. Indeed under the Hindu law it is extremely doubtful whether he could sue directly for any relief under Art. 91 in respect of the release. He might contend, on the authority of *Vasantrao v. Anandrao* (19) that his interests and rights were not affected by it.

But if they are, a very nice question of limitation arises which I shall presently consider. Here I will sum up the result of the foregoing part of this

judgment thus: in my opinion, after an exhaustive examination of the whole law on the subject, this plaint discloses no cause of action and ought to be dismissed. But I can hardly hope that what will be thought by many to be so sudden and revolutionary a decision will be allowed to stand. Scott, J., in *Mahommed's* case (11), while evidently doubting the suitability of the law he felt bound to apply supports the need of continuity in judicial decisions by the usual argument that many valuable rights must have vested already under the decisions of the Courts prior to 1886 and that more mischief would be done by disturbing them than by any attempt to put the law on a new, correct, logical basis. I believe with respect that the balance of expediency (though that is a consideration with which Judges have nothing to do) would be heavily the other way. But my real point is that the law never has been settled as in 1886 Scott, J. believed that it had. Thenceforward the cases are shown not to have affirmed a settled principle, but enormously to have extended in practice, what never was, but was believed to be, a settled principle.

I will next deal with the plea of limitation. Various arguments may be used and need to be considered under this head. The admitted fact being that in 1879 Abdulla passed the release in virtue of which, assuming this to have been a joint family under the Hindu law, he went out of it and purported to take his wife and infant son, plaintiff 1, with him. It is clear that on any view of the law, whether we apply the Hindu law in toto or not, neither Abdulla nor his after-born son Aziz is entitled to any of the reliefs claimed in the plaint. For the plaintiffs cannot have it both ways. They cannot contend that for the purpose of disposing of this release, they will invoke the Mahomedan law, but for all other purposes of the suit they will invoke the Hindu law. If, to get rid of the release, they contend that such a release is under Mahomedan law no more than the transfer of a spes successionis [vide the case of *Samsuddin Gulam Hoosein v. Abdul Hoosein Kalimuddin* (20), decided by Sir Lawrence Jenkins and myself], then, also under the Mahomedan law, the suit

discloses no cause of action in the plaintiffs. Abdulla might have sued to have the release set aside under Art. 91 for fraud, failure of consideration, etc., but that he must have done within three years or not at all. No son under the Mahomedan law takes any vested interest at birth so that the plaintiffs would have no right to sue independently to have their father's release set aside, and under Art. 91 read with S. 7, the plaintiffs (even assuming that they had any such right) would clearly be time barred. This, I believe, is what Tyabji, J., meant in his judgment in *Vasantrao v. Anandrao* (19), and with great respect I doubt whether the force of his point was fully apprehended by the learned Judges of appeal. But that was a case of Hindus under the Hindu law and considerations applied which could not apply under the Mahomedan law. So that for the purpose of this argument, I must suppose that the legal rights of the plaintiff in this respect are governed by the Hindu law of the joint family. (I will here say once and for all that although in the rest of this judgment I shall be obliged to speak as though I accepted the rule that every right put in controversy by these pleadings was governed by the Hindu law of the joint family, I do not accept that rule, for the reasons already given at length).

The close resemblance between this and *Vasantrao's* case (19) is at once apparent. The plaintiff's contention is that it is governed by and cannot be distinguished from that case. For my present purpose, it is enough to say, though I shall be obliged to go further into the case of *Vasantrao v. Anandrao* (19), that the learned Judges of appeal, whose decision was confirmed by the Privy Council, were of opinion that because Anandrao took a vested interest at birth in the joint family property, he did not claim through his father, was not bound by his father Madhavrao's release of 1889 and need not have sued within three years, or at all to have it set aside. But for that opinion, I cannot see how the conclusion reached by Tyabji, J., that reading S. 8 of the old Limitation Act (now S. 7) with Art. 91 the plaintiff's claim was time barred, could be avoided. For taking the release to have been a partition so far as Madhavrao

was concerned (and this appears to have been the view adopted by Jenkins, C.J.), it is hard to say that Madhavrao, in a suit to have that partition set aside on behalf of himself and his minor son, could not have given a valid discharge without the concurrence of the latter. In all matters of that sort, a Hindu father fully represents his minor son, and with the utmost respect, I do gravely doubt whether the question being whether a partition effected by the father for himself and his stirps ought to be set aside for any reason, the father might not bring the suit and in respect of its result give a valid discharge both for himself and his minor son without the concurrence of the latter. If that be a correct view, then time began to run against Anandrao as well as Madhavrao from the date of release. In the view taken by the appeal Court however the article which applied was Art. 127. And it is contended here that that article applies and that the plaintiffs, not having been excluded to their knowledge from the joint family property more than twelve years before suit, are in time.

I wish to make a few observations upon the case-law which has grown up in this Presidency about Art. 127. Formerly, that article was restricted to "Hindus" but in the Act of 1877 "person" is substituted for "Hindu." I do not remember a single case in our books in which the very obvious reason for that change has been noticed. Generally, the Judges have read the changed word as expressing the intention of the legislature that any person whether Hindu, Mahomedan, Christian, Parsi, or Jew might have the benefit of the article. And so, of course, he might, provided its other requirements were complied with. But surely a curious process of reasoning is exhibited in the general statements to be found in some of the earlier cases, that the article now applies to Mahomedans as well as Hindus, without a pause upon the essential requirement of the whole article, namely, that the property in respect of which relief under it is sought must be "joint family property." And outside the Hindu law, "joint family property" is unknown. The change, I submit, must have been rendered necessary by the case-law I have been examining, and

was designed to include Khojas and Memons, who although not "Hindus" might under the decisions in certain circumstances hold "joint family property" in the Hindu sense. There is no other possible case in which anyone but a Hindu could hold "joint family property" at least none that I know of; and if there are any, they like the cases of the Khojas and Memons (and later the Molesalami Girassias of Broach and Suni Bohras of Dhandhuka), must have been proved as special customs. Thus the application of Art. 127 is really not extended, as our Court has frequently seemed to think, to Mahomedans generally, or to any other class generally, irrespective of the possibility of such Mahomedans or members of that other class, holding "joint family property."

Where can any such persons be found? As the decisions relating to Khojas and Memons were understood, it is plain that upon an unimpaired descent from father to sons, the latter might (in the common opinion, would) hold the property as members of a Hindu joint family, and property so held would be "joint family property" within the meaning of the article; but no other. The point is really of considerable importance in view of the current of decisions in this High Court, with which (and for obvious reasons) no other High Court in India agrees. I will take the latest case with which I am acquainted, first, *Fatma Boo v. Ghisan Boo* (21), decided by the present learned Chief Justice and Batchelor, J. The head-note is: "A suit by the daughter of a deceased Mahomedan to recover her share in his property is governed by Art. 127, Lim. Act, 1908." This clearly could not be a Khoja or Memon case, since the leading case in 1847 decided that under a special custom of those sects, a daughter was excluded from inheritance. So that if what I have just said above be rightly reasoned, there could have been no question of "joint family property" in the case. The learned Chief Justice says:

"The question in this case is whether Art. 127, Lim. Act, can apply to a suit by the daughter of a deceased Mahomedan to recover her share in his property. It was decided under the Act of 1877 by an appellate Bench of this Court in 1885 (by Sargent, C. J., (21) [1909] 4 I.O. 242=33 Bom. 719.

and Birdwood, J.) that it can so apply, and that decision, so far as we are aware, has been followed in Bombay for the last 23 years. It is a decision which is binding upon us; and we therefore hold that the suit falls within Art. 127." Now it is clear that this decision need not be taken as expressing the considered opinions of the learned Chief Justice and Batchelor, J., but as attributable to the maxim stare decisis. It is founded expressly on the decision of Sargent, C. J., and Birdwood, J., (not I believe reported, but to be found in the Printed Judgments of 1885†.) Although Judges would always desire to treat everything falling from so eminent and learned a Judge as Sargent, C. J., with the utmost respect, it is permissible, in a theoretical discussion of the law, to examine that decision critically. Sargent, C. J., said: "It remains only to consider whether the claim of Gulam Hussein, as a residuary to one-ninth of the compensation awarded in respect of lots A, C, E, and G, and the claim of Najibunnissa as one of the legal sharers, to one-sixth of such compensation, are barred by time." I pause to point out that from this statement it is clear that the Hindu law was not being applied, in matters of succession and inheritance, to the parties to this suit. One of the claimants was a woman, and she claimed as a sharer. The case was then being dealt with under the Mahomedan law, and that law knows absolutely nothing of "joint family property." The learned Chief Justice proceeds: "The property left by Bakar Ali became divisible, on his death, among those members of his family, who were entitled to shares, according to the Mahomedan law, or were residuaries. Till it was divided, it was, we think, 'joint family property' within the meaning of Art. 127, Sch. 2, Lim. Act, 1877." And after noting the changed language: "It is not necessary therefore to restrict Art. 127 of the present Lim. Act to suits by Hindus. And the question . . . is whether before the institution of proceedings under Act 10 of 1870 the claimants, Gulam Hussein and Najibunnissa, had been excluded, to their own knowledge, from lots A, C, E and G for a period of twelve years."

The material sentence in the judgment is: "Till it was divided, we think it

† See [1885] P. J. 170—*Ed.*

was "joint family property" within the meaning of Art. 127." I submit with great respect that that opinion is untenable upon any view of the Mahomedan law. It could not even be argued that the heirs, sharers and residuaries took over each other by survivorship, which is the crucial test of joint family property. On the death of a Mahomedan intestate, his estate could not in any conceivable circumstances, unless it is by a special custom supposed to be governed by the Hindu law, be "joint family property." It is what it always was an undistributed estate, to be taken in severalty by the heirs, sharers and residuaries.

The view taken by the Bombay High Court, which is based on this decision of 1885, has not been accepted by the other High Courts: *Amme Raham v. Zia Ahmad* (22), *Putcha v. Mohidin* (23) and *Mahamed Akram Shaha v. Anarbi Chowdhurani* (24). Probably in those parts of India no groups of Mahomedans have been brought under the Hindu law of the joint family, and the Courts therefore very naturally declined to hold that property held under the Mahomedan law could be "joint family property" or that Art. 127 could apply in the case of any relief sought in respect of it.

The two cases cited by Sargent, C. J.: viz. *Mt. Khyroonissa v. Salehoonissa Khatoon* (25) and *Achina Bibee v. Ajeejoonissu Bibee* (26), were both decided under the Act of 1859. The words of the section are different from those of Art. 127 of the present Act, although, no doubt, the suits contemplated were suits for moveable or immovable property on the ground that it was joint family property. But the point upon which I rest my conclusion does not appear to have presented itself to the minds of the Judges in either of those cases. Thus in *Khyroonissa's* case (25), the Court says: "The words used in the clause are 'joint family property' and 'property alleged to be joint,' which are the usual terms with reference to joint Hindu families. But we see no exception as to Mahomedan families, or why their respective rights by inheri-

(22) [1891] 13 All. 282.

(23) [1892] 15 Mad. 57.

(24) [1895] 22 Cal. 954.

(25) [1866] 5 W. R. 228.

(26) [1869] 11 W. R. 45.

tance should not come under limitations prescribed generally against parties not trustees as well as trustees." It is submitted that no exception was necessary for the simple reason that no joint family property exists among Mahomedans. *Achinabibi's* case (26) appears to have been decided on the ground that the party against whom limitation was pleaded was proved to have been in "joint possession" within the statutory period. That might as well have been decided under Art. 144 as Art. 127 of the present Act. All that bears on the present argument is this passage :

"In special appeal, it is urged that this suit is barred by the provisions of Cl. 13, S. 1, Act 14 of 1859, inasmuch as the plaintiffs have failed to show any act of possession by any payment on the part of Gholam Ahmed but the inference he has drawn from the fact of these ladies living with Gholam Ahmed, and being supported by him from the proceeds of the property, is a proper and correct one. It would be difficult to know what other evidence could be given of joint possession by women in the position of the plaintiffs' mother in this case, living as she was with Gholam Ahmed, who, as the sole male representative of the family, had the sole charge and management of the property."

In *Abdul Kadar v. Bapubhai* (27), Parsons, J., said :

"The reason assigned for the refusal by the Subordinate Judge is that the court-fee paid is only sufficient to cover plaintiffs' one-third share in the property. No more, however, is ever paid in any suit for partition, and we think that it was quite in the power of the Judge to have ordered the defendant to pay the necessary court-fee on his share as a condition precedent to his obtaining his share. The District Judge refused because this was not a suit for partition of joint family property as known to the Hindu law, but a suit by Musalmans for their share of an inheritance. In this Presidency, however, a suit for partition of an inheritance by Musalmans is hardly distinguishable from a partition suit by Hindus."

The learned Judge goes on to say that the plaintiff was at any rate entitled to the relief by way of ordinary

(27) [1899] 23 Bom. 188.

administration suit, and there I entirely agree with him. It is the last sentence I have quoted which, with respect, I think to be far too broadly stated. I was told in the course of the argument that that passage was frequently cited, and always seemed to pass unchallenged, with approval. Sweeping dicta of that sort, for which it might be difficult to find any solid basis, tend to add to the confusion in which the precise extent of the applicability of a part of the Hindu law to particular groups of Mahomedans in this Presidency is involved. In *Bavasha v. Mosumsha* (28), Parsons and Candy, JJ., purporting to follow *Ghulam Hussain v. Anvarunissa* (29), said : "The first Class Subordinate Judge, A. P., erred in holding that Art. 127, Lim. Act of 1877, applied only to Hindus, and so did not govern this suit," (I note that this is a non sequitur. The article may apply to others than Hindus and yet need not apply to all who are not Hindus, a curious logical fallacy which seems to run through most of the decisions), "which is one by a Mahomedan to enforce his right to a share in the property left by his father and to recover that share by partition. The case of *Ghulam Hussain v. Anvarunissa* (29) is a distinct authority that joint family property includes property left by a deceased Mahomedan and divisible among his heirs until it is divided." Surely such property is not "joint family property;" but all sharers are until division tenants-in-common. But where there is a tenancy-in-common, it may very well be, as was held on the facts of this case, that no tenant-in-common has been excluded so as to start limitation against him, under Art. 142 or 144.

The whole of the law was very elaborately dealt with by Batty, J., in *Abdul Kadir v. Mahomed* (30), and that learned Judge appears to me, speaking with all respect to what may be thought the contrary opinions of other learned Judges, to have laid down the true criteria. But succinctly my submission is that, because Art. 127 is not restricted in terms to Hindus, it does not follow that it necessarily extends

(28) [1890] 14 Bom. 70.

(29) [1885] P. J. 170.

(30) [1903] 5 Bom. L. R. 355.

to every one who is not a Hindu. The criterion of its applicability is the character of the property. That property must be "joint family property" and no such property is known to the law outside the special Hindu law of the joint family. Some who are not Hindus may hold property under that special branch of the Hindu law, but before Art. 127 can be applied, it must be shown that they do. Here, however, it must be admitted that according to the general acceptance, the parties to this suit belong to a class who are governed by the Hindu law of the joint family, so that apart from other considerations, no difficulty need be felt in applying Art. 127 if that be necessary to save limitation. But it is also urged that inasmuch as the release of 1879 binds not only the maker but his children, this suit must fail as long as that release stands. To this the plaintiffs have two answers. First, they contend that they are not bound by the release. Having it set aside, therefore, so far as it may affect them is merely incidental and subservient to the substantial relief they claim.* Next that they only became aware of the existence of the release within three years of suit. The second contention may be summarily dismissed. On the evidence, I hold it established that Jan Mahomed knew of the release many years ago, certainly before he went to Rangoon in 1902. And as to Aziz, I fail to see what interest he can have in the suit, or in what right he is entitled to ask to have the release set aside. It must be held binding on his father Abdulla, who, though he now alleges fraud, undue influence, etc., has never taken any steps to have the release set aside. But if binding on him, then looked at in the light of the Hindu law, such a release would surely take him out of the family from the date of its execution. Aziz was not born till about 1893, 13 or 14 years after his father had gone out of the family, and became, as Jenkins, C. J., put it in *Anandrao's* case (19), "dead." Now, a dead man cannot have any more children, so that from the point of view of the members of this "joint family" in the Hindu sense, Aziz simply does not exist.

The first line of argument raises difficulties, which are to be found in

numerous analogous cases in the books. I give merely as an example, *Abdul Rahim v. Kirparam Daji* (31), where it was held by Birdwood and Parsons, JJ. that Arts. 91, 92 and 93 and S. 2, Lim. Act, apply only to suits brought expressly to cancel, set aside or declare the forgery of an instrument but they do not apply to suits where substantial relief is prayed, and where the cancellation or declaration is merely ancillary and not necessary to the granting of such relief. In the case the documents impeached were all executed by a deceased woman by way of gift, etc., and, therefore, the case does not illustrate as clearly, as some, the principle I wish to arrive at. The general statement in the head-note is unexceptionable, but it leaves in doubt the fundamental question when the cancellation of a document is necessary, and when it is not necessary but, to quote the usual terms, only incidental, ancillary, or subservient to the substantial relief claimed. Where the instrument is executed by the plaintiff himself and would, if allowed to stand against him, effectively defeat his claim, it becomes a little difficult to maintain that although the claim is for substantial relief, the prior cancellation of the instrument is only ancillary or subservient to that relief. And the inclusion of such articles as 93 and 94 in the schedule may be thought surprising. Ordinarily a person is not bound to take notice of forgeries, or to ask the Court to be relieved against them. As these articles are there, however, it would always be open to argue that a plaintiff who happened to know that a document had been forged, but took no steps to have it declared a forgery within the term prescribed, would be barred in a suit, after that period had expired, from disputing the genuineness and binding effect of the document. Suppose, for example, that A knew that a conveyance of part of his property to X had been forged in 1910, but took no steps to have the conveyance declared a forgery. In 1914, let us suppose, X gets into possession of the property so conveyed. A brings a suit in 1915 to recover his property and is confronted with the forged conveyance of 1910. What is the position? If the conveyance be genuine and bind-

(31) [1892] 16 Bom. 186.

ing upon him, he has no case; if he tries to show that it is a forgery, he is told that he is time barred.

I will now give an example of paramount authority, the case of *T. P. Petherpermal Chetty v. R. Muniandy Servai* (32):

"As to the point raised on the Indian Limitation Act 1877, their Lordships are of opinion that the conveyance of 11th June 1895, being an inoperative instrument, as, in effect, it has been found to be, does not bar the plaintiff's right to recover possession of his land, and that it is unnecessary for him to have it set aside as a preliminary to his obtaining the relief he claims."

And the plaintiff was allowed to bring his suit under Art. 144. Pushed to its logical conclusion, that decision of the Supreme Court wipes Art. 91 out of the schedule, for there is no conceivable case in which a plaintiff could obtain the relief contemplated by that Art. unless to that extent at least the instrument were found to be "inoperative" against him. In the particular case their Lordships were dealing with, the plaintiff had sold benami in 1875 to defraud a creditor. It was found that the creditor had not in fact been defrauded, so that the maxim "let the estate lie where it falls" did not apply. But it is equally clear that so long as the sale of 1895 stood unchallenged, it would be an effective bar to the plaintiff's claim to recover the property conveyed. In a suit under Art. 91 brought within three years of the sale, the plaintiff might have been allowed to show its true character and so have declared in 1898, what was finally upon trial, found in 1908, that the instrument was "inoperative" against him and therefore should be cancelled. Not having done so, but for this decision, it might have been thought that he would have been precluded from averring "inoperativeness" on any ground at all against the sale of 1895 after the expiration of the period of limitation prescribed by law on that behalf. It is extremely difficult to reconcile a decision of this kind in principle with such a decision as that where there has been an adoption which if made and valid would defeat a claim, and that adoption has not been chal-

lenged within the statutory period, it is an effective answer to a suit brought under, say, Art. 144 for possession. I submit with great respect that the true rule which is also of universal applicability in this: where the existence of a document, if valid and binding on a party, would defeat his suit to recover possession of any property, he must sue under Art. 91 for the cancellation of that document within three years. (I am not concerned with cases of forgery provided for in Arts. 92, 93, and, of course, the rule I have thrown into very general words might be more precisely laid down, but it serves to express my meaning).

For it appears to me that if Art. 91 is to have any effect at all, that effect would be that documents not impeached under it will not be open to impeachment generally in a suit to recover possession of property. In applying the rule practically, obvious distinctions might be drawn between documents made by the party suing himself or his representative-in-interest, and others. The latter was the case before Birdwood and Parsons, J., and though I think they laid down the law much too broadly in their judgment, no exception need be taken to the decision confined to the facts of the case. Here then the question would be whether the release of 1879 is binding on plaintiff 1; in other words, whether having it set aside or cancelled is necessary to the success of the further substantial relief he seeks, or merely ancillary and subservient to it. Upon the authority of *Anandrao's* case (19), which I will now briefly consider, the plaintiff may fairly contend that he is not bound by the release, and that it is immaterial to his present claim whether it be cancelled or not. If he is right there it would be unnecessary to consider one of his prayers, which is for a declaration that he is not bound by the release, and therefore that as far as he is concerned it may be cancelled. The plaintiffs here chiefly rely on the case of *Vasantrao v. Anandrao* (19). The material facts may be summarized thus: Kashinath the First bequeathed all his property held to have been joint ancestral family property by Will to his grandson, Vithoba to the exclusion of another grandson, Bajirao. Vithoba gave the entire property to Kashinath the Second, who at that

(32) [1908] 35 Cal. 551=35 I. A. 98=7 C. L. J. 528=12 O.W.N. 562=10 Bom. L. R. 590=5 A. L. J. 290=18 M. L. J. 277=4 M.L.T. 12=14 Bur. L. R. 108=4 L. B. R. 266 (P.C.).

time had two sons Ganpat and Madhavrao. Kashinath the Second willed away this property. In 1889, Madhavrao, who had a son Wasantrao, executed a release in favour of his father Kashinath for Rs. 5,000. The plaint in the suit was sworn on 5th December 1901 and came on for trial before Tyabji, J., who held the claim barred by limitation and dismissed the suit.

On appeal before Jenkins, C. J., and Batchelor, J., it was held (1) that the property notwithstanding the Wills and gifts was joint ancestral family property in the hands of Kashinath the second, at the time Madhavrao executed the release. (2) That inasmuch as Wasantrao took a vested interest at birth in the whole joint ancestral family property, he could not be bound by his father's release, for which the consideration paid was wholly inadequate. (3) That the suit was not barred by limitation as neither Art. 126 nor Art. 127 read with S. 8 nor Art. 91 read with S. 8 could bar the plaintiff's suit. Art. 127 was held to apply, and it was found that the plaintiff was not excluded to his knowledge from sharing in the joint family property for more than twelve years before suit, so that he was entitled to his share which (as I understand the judgment) was held to be one-half. This decree was confirmed on appeal to the Privy Council. Upon it two questions arise: (1) How far can it be carried beyond its own facts even where it is sought to be applied as a principle to cases arising between Hindus? (2) How far, if at all, is it applicable to the cases of Khojas and Memons? I should, at the very outset, note what never appears to have engaged much attention since, namely that Madhavrao's release in this case, could not possibly be interpreted as a partition. I have sent for the paper-book and read that release, and it is perfectly clear that Madhavrao was convinced, or professed at the time to be convinced, that the property in his father's hands was not joint family property at all, and that he had no right in it. This was not unnatural in view of the admitted facts that it had once been bequeathed by Will (apparently without any protest on the part of the disinherited grandson) to Vithoba, one of two grandsons, who, had the property been

joint ancestral family property as now held, would have been entitled to equal shares in it, and that subsequently the whole of it had again been given by Vithoba to his only son Kashinath, although it appears that at the time Kashinath had male issue, who again, if the property were joint ancestral family property, would have acquired an interest in it at birth. The history of the property is quite inconsistent with its having been joint family property, and no wonder Madhavrao was convinced that he had no interest in it, and so accepted a relatively small sum as the price of undertaking on behalf of himself, his heirs, executors and assigns not to put forward any claims to it. In the light of other decisions, it is highly important to bear in mind what the real character of the release was. I will only observe on the argument used by the learned Chief Justice upon Art. 126 that he appears to have overlooked what I suppose was in the mind of the learned trial Judge. The gift by Vithoba to Kashinath was an alienation in the strictest technical sense, or purported to be, of the rights of Ganpat and Madhavrao both alive at the time. If in fact Kashinath had held adversely to them under this deed of gift, it is hard to see why Art. 126, should not have applied to the case of Ganpat and Madhavrao and later why, read with S. 8, it should not have barred Wasantrao. The learned Chief Justice asks who was to sue to have this alienation set aside, the donee? Certainly not; but those members of the family who were injuriously affected by it, namely the two grandsons, Ganpat and Madhavrao. Suppose it had been a valid gift its effect would have been to leave Kashinath the Second free to dispose of the entire property, irrespective of the vested interests of his sons. So viewed, it is not easy to distinguish this from any other alienation. It is true that Art. 126 is restricted in terms to an alienation by a Hindu father whereas the only persons who could here be aggrieved were grandsons. But I do not think that the learned Chief Justice meant to make that the ground of repudiating the applicability of that article to the case.

As to the binding effect of the release on the plaintiff Wasantrao the learned Chief Justice says (p. 943): "To the first

my answer is that the release does not bind Wasantrao: he was born at the time and I cannot find in the transaction those conditions which would make the release effective against and operate on the independent interest acquired by Wasantrao at his birth." I note that here it is very clearly implied that such conditions might exist, so that it is necessary always to keep this judgment very strictly to its own facts. And in dealing with the third of Tyabji J's points, the Chief Justice again grounds his decision on the independent right of the plaintiff. In the end Wasantrao was decreed half the joint family property as though Madhavrao by his act of 1889 had, so far as the joint family was concerned, ceased to exist. As however Kashinath had paid according to the release Rs. 5,000 for Madhavrao's share, and Madhavrao was held bound by that release, the logical result, it is submitted, should have been that Wasantrao took at most only one quarter, the other quarter, which would have gone to Madhavrao having been bought by Kashinath the Second. But a careful consideration of the case, as a whole, shows that it by no means concludes the defence here. It does not go the length, as is sometimes supposed, of holding that a disadvantageous partition by a father will not bind his sons, although the only ground of the decision actually stated might be pushed as far as that. For, suppose that in this case the release of 1889 had in effect been a partition, then either the plaintiff, Wasantrao, would have been bound by it, or no minor could ever be held bound by a partition effected by his father. There must be numerous cases where at the time of the partition the property may be worth say Rupees 3,000 and the partition being between three brothers each of whom has minor children, the share of each would be worth Rs. 1,000. By the time the minors have attained majority, it may be that two out of the three shares made many years before have increased in value to a lakh. But the minor son or sons of the third partitioning member could hardly be heard to say on that account that they were no parties to the partition, that they had acquired an independent interest by birth, and, therefore, called for a fresh partition

now that parts of the original joint family property had increased so much in value. The truth is that while the judgment of *Anandrao v. Wasantrao* (19) rests almost exclusively upon the theory that every member of a joint family acquires a vested interest in the entire property at birth, it makes no mention of the equally important principle of the Hindu law, that for purpose of partition, etc., minor members are fully represented by the head of the stirps to which they belong.

Thus, but for special considerations which the learned Chief Justice plainly had in mind, he might have held that the release of 1889 amounted pro tanto to a partition, and had he come to that conclusion, there can be little doubt that he would also have held that Wasantrao as well as Madhavrao was bound by it. This was the principle of later decisions such as that of *Chabildas Lallubhai v. Ramdas Chabildas* (33) (although the release was referred rather to the category of family arrangements than to actual partition); *Umed Babar v. Khushaibhai* (34), where, though *Wasantrao's* case (19) was referred to in the argument, it was not noticed in the judgment of the Court. The latter is an instructive example of the principle applicable to quasi-partitions if I may call them so. The learned Judge, Chandavarkar, J. says:

"What is called by the parties a relinquishment by defendant 2's father was in substance a partition of the family property between him and his co-parceners, and it is nonetheless a partition within the meaning of that term in Hindu law, though instead of receiving his share of the property as it existed then, defendant 2's father received the money value of it. It is urged that that partition is not binding on defendant 2 because the latter was a minor then and the deed Ex. 38 contains no express words to show that his father and his co-parceners intended to include defendant 2's share in his father's share. But the rule of Hindu law is that at a partition among the members of a joint family, each member is presumed to represent not only himself, but also his sons and the son takes his share through his father as being

(33) [1909] 3 I. C. 257.

(34) [1909] 2 I. C. 426.

included in the share allotted to his father."

And to much the same effect in *Ramadas Chabildas'* case (35), decided on appeal by the same learned Judge, thus :

"Then comes the question whether his two sons (appellants 2 and 3) and the son of his deceased brother, are also equally bound by it. It is argued that they are not, on the authority of the judgment of this Court in *Vasantrao v. Anandrao* (19) confirmed by the judgment of the Judicial Committee of the Privy Council in *Anandrao Ganpat Rao v. Vasantrao Madhavrao* (36). These judgments do not lay down the broad proposition that in no case in a joint Hindu family, consisting of a grandfather, son and grandson, the last can be bound by a release of his right to a share in the ancestral estate executed by the son. No doubt, in the concluding part of their judgment, the Privy Council point, as the ground of their decision, to the rule of Hindu law that the grandson has a right to the estate independent of the father ; but they go on also to remark that the late Chief Justice of this Court, who delivered its judgment, has rightly applied the principles of Hindu law to the facts of the case. We must therefore turn to the latter judgment to see how the rule of Hindu law in question was applied by this Court to the facts before it in *Vasantrao v. Anandrao* (19). The Chief Justice holds the grandson not bound by his father's release because of the circumstances of the transaction. In each case, where the question arises, it must be decided on its own facts. It is true that a son takes a vested interest by birth in ancestral estate, but it is not true that because he has that independent existence, he is absolutely independent of his father, where the two are joint and where the son is a minor. The father has the right in certain cases and under certain conditions to alienate the estate and bind his son by the alienation; in a partition among the members of the joint family, of which the father and the son are co-

parceners, the father represents both himself and his sons ; and in all transactions, the father has power to act on behalf of the son as well as on his own, especially where the son is a minor."

I conceive that the true principles of the Hindu law which are required for the decision of this case, assuming the Hindu law to apply, are here correctly stated. And again, I repeat that the release in *Vasantrao's* case (19) could not in any view be regarded as a partition or even quasi-partition, since the ground of it was that the releasor did not believe that the property released belonged to a joint family of which he was a member. It was, therefore, no more than a personal undertaking, not even in the nature of a family arrangement, stretching those words to the utmost; and as such it could hardly be held binding upon the independent interest of minor children. It is true that Madhavrao purports to covenant on behalf of himself, his heirs and executors and assigns, but having regard to the nature of the covenant and the expressed reason for it, no principle of the Hindu law for the joint family need be invoked either of its interpretation, or to attach to its legal consequences. To bind a minor by such a covenant, it surely would be necessary to show that he claimed through his father which the minor in that case did not. Nor in such an act was the father representing, and so binding his son as he would in a partition or quasi-partition, or reasonable family arrangement. On the other hand, it will not do to carry that decision the length of saying that minor sons never can be bound by a father's release, if in the nature of a partition, quasi-partition, or reasonable family arrangement. So that if the Hindu law is to be applied to the partition here in determining the effect of the release of February 1871 it will have to be applied as indicated in the two decisions last cited and not with any special reference to *Vasantrao's* case (19). Having thus far attempted to open the way to a clear view and grasp of principles, it remains to apply those principles to the facts of this case.

But I must cite one more decision which has a direct bearing on the obiter dictum of Sargent, C. J., in *Ahmedbhoy Habibbhoy v. Cassumbhoy* (8), that al-

(35) [1910] 7 I. C. 134.

(36) [1907] 9 Bom. L. R. 595=5 C. L. J. 338=11 C. W. N. 478=2 M. L. T. 151=17 M. L. J. 184.

though among Khojas a son cannot enforce partition during his father's lifetime, he may without inconsistency restrain his father from alienating any part of the joint family property. I commented on that while criticizing the whole judgment, but had not this case in my mind; have since found it. In *Rani Sartaj Kuari v. Rani Deoraj Kuari* (37), the Judicial Committee of the Privy Council lay it down, that "in such a raj, the son is not a cosharer with his father. Property in ancestral estate acquired by birth under the Mitakshara law is so connected with a right to partition that it does not exist independently of such right." That is to say, that because the raj was impartible, the son was not a "cosharer" in the sense in which every member of a joint Hindu family is a cosharer. Applying this emphatic pronouncement to the case of the Khojas, what is the result? Since no Khoja son can enforce a partition, it follows that he cannot be a cosharer. And if that be so, the plaintiffs could not have any of the reliefs prayed for in this suit. That is strong corroboration of the views I expressed in summing up my review of the case-law, which has step by step applied the Hindu law of the joint family to Khojas and Memons.

As to the gift by Datu to Ismail in 1902, no question of limitation arises. As to the release of 1879, I am, owing to the state of the authorities, in some doubt whether I ought to give effect to my own opinion, an opinion I have held unshaken for many years, that in this and all similar cases, a party, who does not take steps in time to remove what else would be a bar to the success of his suit, cannot surmount that bar during the trial, by exactly the attack he ought to have made on it directly and within the shorter time allowed by the law of limitation. But this case is not as clear as I should like a case to be, in which I thus applied the law. For it is doubtful in the first place whether the release, in the light of Mahomedan law, has any effect at all so far as plaintiff 1 is concerned; while it is also very doubtful whether the Hindu law governs Khojas on a point of this kind. So that I shall not decide the case on the ground of limitation.

(37) [1888] 10 All. 72=15 I. A. 51 (P. O.).

But I must note one argument which was frequently used. Mr. Bhandarkar for the plaintiffs contended that even were this a release, it was never acted upon. I confess I hardly know what this means, though there are dicta in some of the cases which might suggest that some legal doctrine does underlie it. A release by way of quasi-partition must operate or not. If it operates, then it does so from the date of its completion and execution, and I do not see how there can be any question of its having been acted upon or not. What is really meant by the argument is, I think, that the subsequent conduct of the parties shows that there was no intention to extend the operation of the release beyond its executant. Here Abdulla purports to take his son and wife out of the family. But it is said, the evidence shows, that both his son and wife for that matter continued to live with and be maintained by the family, so that neither Datu nor Ismail could really have intended to exclude them under the release. But the operation of a release, as means of partition, is rather legal than practical. It is perfectly consistent with that legal operation that the members of the family should continue to extend hospitality and assistance to those who under the release had lost all rights, as members of a joint family, to the joint family estate. Once the release had taken effect, and so worked a partition, it could only be by intentional reunion that the former members excluded under it could once again become members of a joint family. And this could never be effected without intention, merely by extending towards them such natural kindness, as their relationship would call for. In the present case, all evidence about Jan Mahommed, his mother, Ratanbai, his younger brother, Aziz, having lived and been maintained, the children educated, married and so forth, at the expense of Datu and Ismail, is, in my opinion, if not wholly irrelevant, of little value. That there could hardly have been any deliberate intention to reunite is clear from the age of the two plaintiffs. Datu and Ismail had nothing whatever to gain from them. Jan, it is true, was of an age to do business since, say, 1875, but his services could not have

been valuable and as I shall presently show from his own letters, it is demonstrably certain that as late as 1903, he himself certainly did not believe that he was a member of the joint family consisting of Datu and Ismail, or had any claim whatever on the joint family property. Aziz was a mere child, up to 1905. It appears that for the last ten years, Jan Mahommed has been living away from Datu and Ismail. As soon as Aziz was old enough to be employed, Ismail gave him work to do in the shop, but was careful to pay him wages, and his name is entered in the attendance book among the other employees. There is nothing in all this to indicate any intention on the part of Datu and Ismail to reunite. While as far as Abdulla is, concerned, he has always remained what he was before the release of 1879, a sodden useless drunkard. As the release was probably due to his intemperate and violent habits, it is not likely that once rid of him, Datu and Ismail would have wished to take him back into the family.

As most of the evidence for the plaintiffs has been directed to proving that as regards Jan and Aziz the release was "never acted on", I have thought it convenient to dispose of that argument in this place.

On the same evidence the Court has been asked to infer from the facts that their grandfather and uncle kept these boys, paid for certain ceremonies, educated them and got them married, that they thus became members of the joint family entitled merely as the recipients of much kindness in the past, to insist upon despoiting their benefactors of a great portion of their wealth. This has always seemed to me an absurd proposition, although it frequently makes its appearance in argument. If the joint family relationship is not fastened on Datu and Ismail by law, I certainly would not infer that it had been voluntarily undertaken merely because these men showed great natural kindness to their grandsons and nephews while the latter were helpless children and in need of protection.

I will now deal with the release in this suit. There can, I think, be no doubt, looking to its wording, but that the parties to it were under the belief

that it ought to be shaped to meet the Hindu law of the joint family. Yet it is not an ordinary partition, as it was certainly meant to be. While it displays clearly enough the belief that the requirements of the Hindu law had to be met, it displays with equal clearness the ignorance of the parties to it of that law. It is easy to understand why, in the vicinity of Bombay, these Khojas should believe, however unpalatable that belief may be, that they are governed by the Hindu law. But, since in all probability except for purely legal purposes they never have fully assimilated many of the features of the Hindu law of the joint family, it is as easy to understand the peculiarities of an instrument like this release. We have the evidence of Datu to explain how it came about. He says that he went in fear of Abdullah's violence, and was therefore anxious to be free from him. Apparently Abdullah himself wanted his "portion," so it was agreed that he should separate from his father and younger brother Ismail. A panch was convened, and the first draft release appears to have been made at the end of 1878 on this basis. The entire joint family property was valued at Rs. 4,500, and Datu made five lots of it: one for Abdullah, his wife and son, worth Rs. 900; one for himself; one for Ismail; one for his unmarried daughter and one for his mother. Had the partition really been made under the Hindu law, had these people any real understanding of the simplest principles of the Hindu law of the joint family, they would have made three lots, of which Datu would have taken one, Ismail one and Abdullah one. But it is clear that there was no complete partition, nor was it the wish of Datu to separate from Ismail, who appears to have been a good son. The "release" then goes on to divide the nine hundred rupees' share of Abdullah thus: Rs. 400 in cash to Abdullah; Rs. 200 worth of ornaments to his wife; and a house valued at Rs. 300 to the plaintiff, then an infant. Now although such a partition does not conform with the ordinary requirements of the Hindu law there is nothing objectionable, unfair or unreasonable about it, if the total property owned by the family at that time was not worth more than Rs. 4,500 in all. It was very right to

take the precaution of settling something on Jan, seeing what kind of man his father was. That house still belongs to the plaintiff Jan Mahommed; and Abdulla his father has resided in it ever since. Why should it then not be binding on plaintiff 1 Jan Mahommed? Suppose that the family fortunes of Datu and Ismail, instead of increasing had decreased, suppose that this house had turned out a very valuable piece of property, does anyone doubt but that plaintiff 1 would have insisted as vehemently upon the validity of this release, partition, family arrangement, call it what you will, as he now repudiates it? What is to be looked at in estimating the reasonableness of such family arrangements (under the Hindu law) is not the state of the family fortune at the day it is called in question, but at the time it was made. If there was then an adequate motive, and if, on the whole, it was a reasonable and fair arrangement, the Court will not scrutinize too closely the adequacy of the consideration: vide judgment of Chandavarkar, J., in *Chabildas'* case (33). And though, as I have said, I am not sure whether such a family arrangement could be upheld under the Mahomedan law, I am treating the case here, as though the parties were governed by the Hindu law. It is conceded that doing so affords the plaintiff the best chance of success, since under the Mahomedan law they have no case at all. I attach no importance at all to Abdulla's evidence that the joint family property at the time of the release was worth at least Rs. 10,000 any more than I do to his many other wild and reckless statements. The wonder is that the man is alive and able to talk coherently at all. I accept the valuation put on the property by Datu, as well as his account of the entire transaction. Viewed in that light I am not disposed to say that it was not a perfectly fair family arrangement made for a sufficient motive, and as such clearly within the rule in *Chabildas'* case (33).

The evidence in the case proves beyond all reasonable doubt that Jan, plaintiff 1, never believed himself to be a member of a joint family in the Hindu sense, or entitled as such to share in the joint family property. We need go

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no further than his five letters from Rangoon for convincing proof of that. In the witness-box he impudently pretended that he had been sent to Rangoon as a member of the joint family to open up rice business there. But look at the facts. He was given Rs. 140 debited to him: vide Ex. 16, and immediately afterwards Rs. 5. The latter item is in the current household account as are all Ismail's expenses. Then see Ex. 22, the account books of Jan's separate shop. He has admitted that he was carrying on a separate business. The business was in his name and the books in his handwriting. Exs. 23 and 24 are quarrying contracts in the name of Jan. Ex. 21 is a license to keep explosives in his own name. Then there is a sale of immovable property in Malad. Ismail was the vendor, the purchaser was an outsider, and Jan himself was the broker. His explanation of this is simply absurd as is his explanation of so many passages in his letters from Burma (Ex. 12), which prove conclusively, that whether in fact he was or was not a member of the joint family at that time, he did not believe himself to be: (see Ex. 6). In 1881 Ratanbai sold her anklets to Datu (Ex. 14). Of course, had she been a member of the joint family, it is hardly likely that any such sale would have taken place. There was no dispute at that time. In 1885 we find Abdulla selling a cart and bullocks to Datu, Ex. 5. There can be no doubt that he at any rate was separated. On 25th December 1885 Abdulla passed a rent-note to Datu: see Ex. 30.

Going back to Ex. 16, which was just before Jan went to Rangoon, the entry shows that the money was meant to be a loan. There were no disputes at that time. Then follow the letters from Rangoon between July and September 1903 in which Jan begs for a loan and offers to pay interest. There is no mention in any one of these letters of what Jan has sworn here that he was sent to Rangoon on joint family business. Datu Raghu's rice shop in Bombay had been closed at a loss in 1902. In one place, Jan asks, "What is my share in the Jaoli business I did in partnership with you (Ismail)?" : see Ex. 13 of 29th July 1903. There was a partnership in Jaoli business and Jan's share was ascertained and paid to his wife, Fatma. But this

is utterly inconsistent with his evidence that he was all the time a member of the joint family. And see Jan's evidence about these letters. Most of the specially damaging passages were put to him, and he had but one answer, that whenever he said "my," he meant the joint family shop or business. Finally, he declares his intention of remaining in Rangoon and never returning to Datu or Ismail. As to Aziz, he was employed in the shop for the first time in 1907 and was paid wages : vide Ex. 8. These entries are in his own handwriting, Ex. 9. Only two witnesses were called for the defendants, Datu and Ismail, but they both appeared to me, particularly Ismail, good. These are the defendants themselves and were only called to prove the release after which the burden of proof shifted to the plaintiffs. The evidence adduced on behalf of the plaintiffs is of the worst kind. Instead of leading off, the plaintiffs reserved themselves and their father to the last, in order, as was suggested, that they might hear what sort of case their witnesses could make for them. And that I think is at least probable. This evidence was directed to proving on what terms Jan and Aziz lived with Datu and Ismail. I have already stated that in my opinion that evidence is useless for that purpose. Conceding all that the witnesses say to be true, I still do not think that this would be enough to prove reunion, or such contributions to the family fortunes as might set up a new joint family, independent of that which had been formed before the release. Much of the evidence about the extent to which Jan and Aziz helped Datu and Ismail in their business is simply ridiculous, notably for example Narayan Kamu.

The plaintiffs relied exclusively on the law. In his last address to the Court, Mr. Bhandarkar did not touch the evidence, such as it is, that has been adduced on behalf of the plaintiffs. The oral evidence, leaving aside that of the two plaintiffs themselves and their father defendant 3 Abdulla, is, in my opinion, utterly worthless. I have been over the documentary evidence and I do not find in it anything that calls for special comment.

I will now, therefore, draw together the various threads of reasoning con-

tained in the judgment so far, and apply the results to the actual decision.

1. I have said that, in my opinion, the law does not warrant the application of the whole law of the Hindu joint family to Khojas and Memons for any of the purposes of this suit. What in effect the plaintiffs are suing for is a declaration of their rights as members of a joint family under the Hindu law. That, I think, goes far beyond the reach of any of the authorities. So that upon that ground I should, were the subject less complicated, be prepared to dismiss the plaintiff's whole suit. But having regard to one or two of the decisions I do not think that it would be safe to do so, without dealing with some of the questions raised upon the footing of the Hindu law of the joint family.

2. Assuming that these people do for the purposes of this suit constitute a joint family governed by the whole Hindu law on that subject, it is first to be noted that one great exception to that law has been established. No Khoja son can sue for partition during his father's lifetime. Incidentally, I must point out that upon the authority of the Privy Council case cited, *Rani Sartaj Kuvari v. Rani Devraj Kuvari* (37), this takes the Khojas at least clean out of the law of the Hindu joint family. But if the plaintiffs cannot sue for a partition, it is premature to sue for a declaration of what their rights are at present on the footing of being members of a Hindu joint family. No object is to be gained by such a declaration, nor can any consequential relief be given upon it. It might well be that before a partition could be effected, both plaintiffs might be dead, and the whole proceedings thus turn out to be infructuous. If this view be correct the only reliefs to which the plaintiffs could at present be entitled are, the cancellation of the release of 1879 against plaintiff 1 and setting aside the deed of gift of 1902 by Datu to his son Ismail; possibly, though I do not think the time is yet ripe for this, setting aside Datu's will. As to that the only use which has been made of it in this case has been in argument, to show that Datu himself still regarded his family as joint. But, I think, the point has no importance.

3. Now, assuming once more that the Hindu law of the joint family governs this part of the case, is plaintiff 1 entitled to a declaration that the release of 1879 is not binding upon him, and as far as his he is concerned must be cancelled? If it is binding upon him, then unless he can get it cancelled it would be an effective Bar to the whole of his present claim. Therefore, following the rule I have indicated, it appears to me that he was bound to sue within three years of becoming aware of it, to have it set aside. And not having done so (for I hold on the evidence that he was well aware of it before he went to Rangoon), he would be time barred. There would be no need to call in aid S. 7, Lim. Act. But if it were binding upon him, it is hardly likely that he would have been able to obtain its cancellation on the ground of fraud (no details given in the pleadings as by law required) or inadequacy of consideration: vide Chandavarkar, J's. judgment in *Chabildas'* case (33) or any other sufficient reason. The release clearly binds Abdulla, and adopting the Hindu law, its effect would have been to take him out of the joint family from the date of its execution. In that event, it is equally clear that Aziz could have no case at all in this suit. For it is beyond reason to suppose that he has been readmitted into the joint family and has by his exertions contributed to its wealth. All that could be said for him is, that Datu, his grandfather, and Ismail, his uncle, undertook his maintenance, upbringing and education, and defrayed the expenses of such ceremonies as the law required to be performed. But this, in my opinion, affords no ground at all, much less a decisive ground for the inference that he thus became what he was not by birth, a member of the joint family. It is only, therefore, the case of plaintiff 1 that needs any consideration. For he was born at the date of the release of 1879 and on the theory of the Hindu law of the joint family would have thus acquired an independent interest in all the family property, which might survive a release by his father purporting to take himself and his minor son out of the joint family. Here the plaintiff relies solely on the principle of *Wasantrao's* case (19). I have pointed out that the

facts there were special. There was no semblance of a partition because the releasor did not believe that the property was joint family property at all. Here the case is widely different. Ordinarily, a release by one member of a Hindu coparcenary does operate as a partition at any rate as far as he is concerned. It may not be in the strict legal sense a partition, since it may not necessitate a complete partition between all the members of the coparcenary. But if its effect is to take the releasing member out of the joint family, it would likewise, on general principle, as pointed out by Chandavarkar, J., take his whole stirps out with him. Nor can I see any distinction in theory between a quasi-partition thus effected and a regular partition.

It surely cannot make any real difference whether one of, say, three coparceners takes his third of the whole property valued at Rs. 1,000 or Rupees 1,000 in cash. The mode of carrying out a partition over large tracts of the country inhabited by the poorer rural classes, is to make up the whole property into lots; the members entitled then draw the lots. This is quite a common practice, as I believe anyone with mufassil experience, will admit. Or it certainly used to be thirty years ago and I see no reason to doubt that it still persists. Now in such a case suppose there are three brothers A, B, C, partitioning a small estate. Three lots are made; B who has two minor children draws one; A and C offer him its money value and he accepts. A and C thereupon do not carry the partition further. In strict theory they re-unite but in practice nothing need be done at all. What is the result? Surely that B and his two sons have now ceased to be members of that coparcenary. Would any Court be inclined ten years later, at the suit of these minors, to rip open that partition and declare them still entitled, as though their father were dead, to take his share? What then has become of the consideration paid by the other two members of the coparcenary? This is what in fact was done in *Wasantrao's* case (19), and this feature of it has given rise, I believe, to much discussion and criticism among Hindu lawyers. The opinion expressed ;

Court, more than once since the decision of that case, has been that it must be very strictly confined to its own facts. This is the more necessary because, while those facts are very special and peculiar, there are indications in the judgment of the learned Chief Justice, that he was quite ready to recognize a release, under other conditions as operating to separate releasor and his branch from the rest of the family. The only ground assigned directly in the judgment namely the independant acquisition of a right at birth by every child could not be used generally. For it would apply equally in the case of every partition in which one or more of the stirps contained minors. And that is a proposition which I do not think anyone would be found to argue seriously. In this connexion, I refer to the well established law that an alienation by one of two or more coparceners to a stranger, operates as a partition of the estate. The alienee can come in on the strength of the alienation and insist upon having a partition made. It is true that we here come in sight of another and quite unique feature, hardly belonging to the Hindu law proper, but engrafted on it by the decisions of the Courts, namely, that while such an alienation works a partition, it goes no further than the alienor's share. That is to say that the alienee comes in exactly in the shoes of the alienor, and is liable to be called upon to divide again with all the members of his stirps claiming under him; in other words, that two partitions are worked out at one and the same time. But my point is that so far as the minors under the alienor are concerned, they have no right at all to protest against the partition. Now suppose such an alienation were made at a time when the entire estate was worth no more than three thousand rupees, and that the alienee of a third lay by for a year or so, and then enforced his right. First let us suppose that he had allowed a long time to elapse, and that the value of the joint family property had increased by 100 per cent. and in the meantime three sons had been born to the alienor. To what would the alienee be entitled? That is one view of this difficult doctrine; another more germane to my pur-

pose is this: suppose the alienee enforces his rights, (as, in my opinion, he ought to do at once) before the conditions have changed. His alienor has four minor children. The property is partitioned into three lots, worth Rs. 1,000 each. The alienee takes one of them and has to divide it with the minor children each of whom gets Rs. 200. The other two brothers either do not separate, or immediately reunite, and by the time the minors are of age, their share of the property is worth three lakhs. On the principle of *Vasantrao's* case (19), the minors might now come in and contend that they were no parties to their father's alienation which had turned out so badly for them, that they were not bound by it, as each had acquired a vested interest at birth, and were therefore entitled to a re-partition of the estate in the hands of the other former coparceners. No such case has yet arisen I believe in any of our Courts, but I see no reason why it should not. But the broad rule of the Hindu law is that fathers effecting a partition, whether directly or indirectly, carry their children with them. The principle of representation here overrides the principle of the vested interest at birth, and if the Courts are satisfied that the "partition," whether direct or indirect by way of release or family arrangement, was fair and reasonable, the minor children of the releasor or maker of the arrangement for them will not be allowed to set it aside on attaining majority. And that is the principle I would apply in the present case.

Thus assuming that if there were no such principle, or if the release were of the kind dealt with in *Vasantrao's* case (19), the minor children would not be bound by it, then no bar of limitation would exist against plaintiff 1 in this case. But as there is such a principle and the release here is very different from the release in *Vasantrao's* case (19), it appears to me that the bar of limitation does exist, and has not been surmounted. In my opinion, plaintiff 1 is time barred. Further, even assuming that there is no bar of limitation and that the suit is governed by Art. 127 so far as the Limitation Act reaches, we have still to see whether the release is not a good family arrangement binding upon the plaintiff. As to Art. 127, I

have shown, with some elaborateness, that I do not think it ever can apply to Mahomedans, merely qua-Mahomedans, and I doubt very much whether it can apply even to these Khojas and Memons except in proper cases, when the property is shown to have gone through one unimpaired descent and thereafter to have been held by the survivors as joint family property. Such a case uncomplicated by a release or other form of partition might very well occur, and then Art. 127 certainly would apply. But this is not such a case, because those claiming are not in a position to sue for partition, and therefore not in a position to claim any share of the joint family property. Further, this case is complicated by a release. Under the Hindu law, as laid down in *Chabildas'* case (33), I think that that release was a perfectly good family arrangement, having regard to all the circumstances then existing. The property was not then very large. Abdulla was a useless and objectionable member of the family. He wanted to go out of it, and the other members wanted to be rid of him. They gave him a fair share, and so divided it that the interests of his only minor child were protected. Upon a right understanding of the Hindu law, if the total value of the joint family property had then been, as I hold it was, Rs. 4,500, Abdulla got a good deal less than he was entitled to, and so did plaintiff 1. But we cannot go back 30 years to examine all those details. According to the understanding of the parties, a fair distribution was made.

Abdulla accepted it for himself and his minor child. I do not see why the Court should now interfere, merely because since that time Ismail has by his own personal skill and industry acquired very valuable properties, to a share in which plaintiff 1 can have no conceivable moral or equitable right. It is indeed only by applying the nucleus doctrine that he could ask to investigate the steps by which Ismail has made his fortune, and I see no ground in any of the authorities for applying that doctrine to Khojas and Memons, while there are cogent reasons for excluding it. Who knows what may happen in, say, the Currimbhoy family? On the death of the present Baronet, his sons may sue to have the property placed in trust

under an Act of Parliament for the support of the Baronetry, declared to have been joint family property, over which Sir Currimbhoy had no powers of disposition. Speaking for myself, I would not extend the Hindu law of the joint family one inch further than the authorities actually compel me. I have shown that they do not yet compel the Court's to extend it very far, certainly not the length I think of introducing the nucleus theory into the system of law by which these sects are governed. On the other hand, I have pointed out the great practical difficulty of drawing the line, so long as succession is understood to include succession modified by the Hindu law of the joint family, to undivided ancestral family property. In the first place, there is not and can never be any succession in the ordinary sense of the word where the property is of that character. And that is a consideration to which sufficient attention has not, I venture to submit, yet been paid.

In the next place, if succession and inheritance are terms which in this special connexion are meant to be applied only to the mode of regulating shares in property undisposed of by Will, the character of the property, where that mode is to be sought for in the Hindu law, cannot be neglected. And that would open the door in every case to the usual interminable inquiries as to the manner in which the property had been acquired from the remotest period at which the family ancestry could be found. And again it is worth noting that if the property be really ancestral, or joint family property in the true Hindu sense, no Will could ever be made. So that succession would then always be confined to cases of intestacy, and if the property were found to be joint family property, to cases in which succession proper does not exist at all. But this again opens up another large question, the fringe of which was touched in *Mahommed's* case (11), where Scott, J., held that because the property was ancestral joint family property, a Will, in fact made, was invalid. How far the extension of the Hindu law of "simple succession and inheritance" precludes Khojas and Memons from making a Will under their own law, is a question which will have to be settled very definitely and very soon.

But in this case it is quite clear that no question of succession or inheritance arises at all. It may in the future, but it has not yet arisen. The most that plaintiff 1 can say is that the release might operate to bar his claim when the time shall be ripe for bringing it. But if it does, I say he is already time barred in that respect, and can obtain no relief of that limited kind in this suit. Further; I am very clearly of opinion that he never will be entitled to any relief on the general ground, as a member of a joint undivided Hindu family. For I hold that the release of 1879 was a perfectly good family arrangement under which Abdulla and his stirps went out of the family (if they were ever in it), and therefore that even were this a case of "succession or inheritance" within the meaning of the authorities, this plaintiff could not succeed.

There can be no question on the evidence what the understanding of the parties themselves has all along been. I think I have shown in my brief examination of the documentary evidence for the defendants, that it all points one way. It is only consistent with all parties concerned having fully accepted the release as a partition, and having acted upon that understanding for 30 years. That being so, I find no ground upon which any part of the plaintiff's claim could be awarded. I hold that it entirely fails and must now be dismissed with all costs.

G.P./R.K.

*Suit dismissed.***A. I. R. 1914 Bombay 102**

HEATON AND SHAH, JJ.

Haribhai Hansji — Plaintiff—Appellant.

v.

Nathubhai Ratnaji—Defendant—Respondent.

Second Appeals Nos. 42 and 43 of 1913, Decided on 13th October 1913, from decision of 1st Cl. Sub-Judge, Ahmedabad, in Appeals Nos. 73 and 74 of 1910.

Contract Act (1872), S. 65—Mortgage of unrecognized portion of bhag held void—Personal covenant by mortgagor to compensate mortgagee in case of obstruction of possession—Mortgagor cannot recover possession without payment of proper compensation.

A valatdan patta (mortgage of unrecognized portion of a bhag) was held to be void, but, as there was a personal covenant by the mort-

gagor to compensate the mortgagee in case his possession was obstructed, the former was not allowed to recover possession of the lands from the latter without payment of proper compensation. [P 103 C 1]

G. N. Thakor—for Appellant.*N. K. Mehta*—for Respondent.

Shah, J.—In this case the plaintiff sued formally to redeem but substantially to recover possession of the property mentioned in the valatdan patta dated 10th June 1902. Several defences were raised to this suit on behalf of defendant 1. It was held by the trial Court that the document called the valatdan patta was a mortgage, that the plaintiff was entitled to recover possession, and that he was liable to give certain compensation to the defendant as claimed by him. The decree of the trial Court was confirmed subject to a slight variation as to interest by the lower appellate Court.

The plaintiff has now appealed and has urged that the order of the lower Court allowing compensation to the defendant is wrong, firstly, because the bond is void under S. 257-A, Civil P. C., of 1882; and secondly, because the bond is void in virtue of the provisions of the Bhagdari Act. It is contended that no compensation under S. 65, Contract Act, should be allowed, as it must be assumed, in the absence of any evidence to the contrary, that at the time when the agreement was entered into the parties were aware of the real nature of the transaction.

As to the first point, from the recitals in the document the amount of the bond does not appear to be excess of the decretal amount. There is no evidence in the case to show that at the date of the bond the amount due under the decree was less than the amount of the bond. The Appellate Court has observed that in this case the bond appears to have been taken for "far shorter amount." Under these circumstances I am of opinion that the bond is not proved to be void in virtue of S. 257-A in this case. It is not necessary therefore to consider the question whether compensation under S. 65, Contract Act, could be allowed if the bond were void under S. 257-A.

As regards the second point: the facts are that the defendant obtained possession of the property from the date of the bond and continued in possession

up to the date of the suit. The plaintiff brought the suit in 1910 to recover possession of the property. Until then it appears that no obstruction was caused to the defendants' possession under the bond. The plaintiff thought of recovering possession on the ground that the mortgage of an unrecognized portion of a bhag was void in this suit. There is nothing to show that the defendant was aware of the fact that the bond was void under the Bhagdari Act at the date of the bond. It is clear that the bond was discovered to be void after the suit was brought. Assuming for the sake of argument, that the plaintiff's contention, that S. 65, Contract Act, has no application to a case in which the parties are aware at the time of the transaction that it is void, is good, I am of opinion that in this case the agreement is discovered to be void within the meaning of S. 65, Contract Act long after the transaction. It is clear that if the agreement is discovered to be void, it is open to the Court to allow compensation to the person to the extent of the advantage received under such agreement by the other side. In this case we have the additional circumstance that there is a personal covenant in the bond to give compensation in case there is any hindrance caused to the possession of the defendant under the bond. I am of opinion that even under this covenant the order of compensation against the plaintiff would be justified. This view is supported by the ruling of *Jijibhai Laldas v. Nagji Gulab* (1). The lower appellate Court appears to have thought that in view of *Jijibhai's* case (1) the defendant ought not to be ordered to give up the lands without receiving back his moneys. It is necessary, however, to remember that neither under S. 65, Contract Act, nor under the ruling in *Jijibhai's* case (1) the Court is bound to award compensation in all cases as a matter of course where the document is found to be void in consequence of the provisions of the Bhagdari Act. It has to be considered in each case as to whether the agreement is discovered to be void and whether any person has received any advantage under such agreement as required by S. 65, or whether the covenant in

(1) [1909] 3 I. C. 761.

each particular case justifies the order of compensation. The amount of compensation also has to be determined with reference to the circumstances of each particular case. In the present case there is no dispute about the amount. The parties were agreed in the lower Courts that if the compensation could be awarded to the defendant, the amount should be that which is allowed by the lower Courts. Under the circumstances of this case I feel satisfied that both under S. 65, as also under the covenant contained in the bond, the order as to compensation is correct.

Lastly, having regard to the variation in the terms of the decree of the Court of first instance made by the lower appellate Court, the effect of which is not quite clear to us and which is likely to lead to complication in calculation, I am of opinion that it is desirable to restore the decree of the trial Court. That decree allows interest in a manner which under the circumstances of this case, I think, is fair. The difference between the decree of the trial Court and that of the appellate Court, as I understand it, is not of a very substantial character, and even in the absence of any cross-objection on the part of the defendant I think, under the circumstances, it would be proper to restore the decree of the trial Court.

I, therefore, modify the decree of the appellate Court by restoring that of the trial Court subject to the proviso that the first instalment, if not paid, should be paid by 31st December 1913, the time for the payment of other instalments being the same as fixed by the decree of the trial Court.

The appellant should pay respondent 1's costs of this appeal and of the appeal in the District Court.

Heaton, J.—I concur in the decree which is to be made and I have little to add. I do think it necessary to point out that apparently on the strength of the case of *Jijibhai v. Nagji* (1) there is a tendency to assume that because an agreement is in fact void, it follows without more ado that it is discovered to be void within the meaning of S. 65, Contract Act. Personally I do not think that any such thing necessarily follows. As my learned colleague indicates, in every case the circumstances

of the case have to be looked to, and it has to be determined whether in that particular case S. 65, Contract Act can properly be applied.

G.P./R.K.

Decree modified.

A. I. R. 1914 Bombay 104

SCOTT, C. J., AND BATCHELOR, J.

G. I. P. Railway—Defendant—Appellant.

v.

Municipal Corporation, Bombay—Plaintiff—Respondent.

Original Civil Appeal No. 17 of 1913, Decided on 5th September 1913, from a decree of Beaman, J., in Suit No. 693 of 1912.

(a) *Railways Act (9 of 1890), S. 7*—Railway Company wishing to lay railway lines on Bombay Municipal street—Permission under Land Acquisition Act or Municipal Act, S. 293, is not necessary—*Bombay City Municipal Act (3 of 1888), S. 293*.

The words "notwithstanding anything in any other enactment for the time being in force," in S. 7, Railways Act, empowers a Railway Company to do certain acts specified in the section regardless of the provisions of other enactments. Therefore, where a railway Company wishes to lay a line of Railway upon and across a Bombay Municipal street, it is neither necessary nor appropriate to proceed under the Land Acquisition Act or to obtain permission under S. 293, City of Bombay Municipal Act. [P 105 C 2, P 107 C 1]

(b) *Bombay City Municipal Act (3 of 1888), S. 289*—Effect of S. 289 stated.

The effect of S. 289, Bombay City Municipal Act, is only to vest in the Corporation such property as is necessary for the control, protection, and maintenance of the street as a highway for public use. [P 106 C 2]

Binning and Campbell—for Appellant.

Jardine and Strangman—for Respondent.

Facts.—Appear from the following judgment of Beaman, J.:

"Notwithstanding the ingenious arguments of defendant's counsel the point seems too simple to allow of any doubt. Without enquiring how much or how little under the term "street" vests under S. 289, Municipal Act, enough certainly does (and this was almost conceded) to support an action for trespass against anyone interfering with the use of a public street as such. S. 293 expressly and designedly contemplates a case like this. No argument has been attempted in support of what was foreshadowed in the first issue. That was abandoned. No permission has been granted. Then let me

consider S. 7, Railways Act. Is a public street "immovable property"? Certainly. Does this public street belong to the defendant Company? Certainly not. The only question remaining to be answered is whether it is immovable property subject to the Land Acquisition Act. In my opinion, most surely it is. Defendant contends that it is not, because it is already a public street, and that which is already public property cannot be acquired a second time for a second public purpose. I am not aware of any authority or of any reason upon which that proposition can be founded. I am referred to S. 10 and S. 14, the latter more emphatically, in support of this contention. I am unable to see how the section can have any bearing or relevancy. The former section merely deals with damage caused by the Company acting under S. 7 and pre-supposes, of course, that it is acting under that section. It is said for the defendant Company here that it cannot be a trespasser because it is acting under statutory authority. That simply begs the question. If it is, *cedit quaestio*. If not, it is as much a trespasser as though S. 7 were not there. S. 14 cannot possibly bear the artificial strain put upon it to support the defendant's argument. It merely deals with a numerous class of cases, of which this might have formed an example, had the Municipality, acting under S. 293 of its Act, permitted the defendant Company to lay its rails without any conditions. I do not think that any of the cases cited for the defendant Company are of any assistance. Nor do I think that I gain much from *Rangeley v. The Midland Ry. Co.* (1), upon which the plaintiff relies. That is certainly in point, and in spite of the attempt of the defendant to distinguish between the provisions of S. 84, Land Clauses Act in England, and the provisions of the Land Acquisition Act, the case is a good enough authority upon the general principle. But here I do not feel in need of authority. I have the statutes, and I have only to apply them to a simple set of admitted facts. Under those statutes the defendant Company could make its private terms with the Municipality, or it could acquire the

(1) [1868] 3 Ch. 306=37 L. J. Ch. 813=13 L. T. 69=13 W. R. 547.

portion of the street it needed under the Land Acquisition Act. But until it has done one or the other it is clearly a trespasser upon the plaintiff's land. It does not seem to me to affect this conclusion in the least that there may be some doubt as to the quantum of interest the plaintiff has to sell in proceedings under the Land Acquisition Act. The plaintiffs do not press for any particular quantum of damages and it would be sufficient to award them Rs. 500 as damages for trespass and all costs of the suit. Declaration in terms of prayers (a) and (b) of the plaint and decree in terms of prayer (c) thereof."

Scott, C. J.—This suit was instituted by the Municipal Corporation and Commissioner of Bombay against the G. I. P. Ry. Co. to establish that the defendant Company could not lawfully maintain lines of railway across the Sewri Koliwada Road, a public street vested in the Corporation under S. 289, Bombay City Municipal Act, without either obtaining permission granted by the Corporation and confirmed by Government under S. 291, Municipal Act or acquiring the land required for the level crossing under the Land Acquisition Act.

The defendant Company pleaded that they had authority to make and maintain the lines of railway under S. 7, Railways Act (9 of 1890), which, so far as is material, is in the following terms:

"(1) Subject to the provisions of this Act and, in the case of immovable property not belonging to the Railway Administration, to the provisions of any enactment for the time being in force for the acquisition of land for public purposes and for Companies and subject also, in the case of a Railway Company, to the provisions of any contract between the Company and the Government, a Railway Administration may for the purpose of constructing a railway or the accommodation or other works connected therewith, and notwithstanding anything in any other enactment for the time being in force, (c) make or construct in, upon, across, under or over any lands, or any streets, hills, valleys, roads, railways, or tramways, or any rivers, canals, brooks, streams or other waters, or any

drains, water-pipes, gas-pipes or telegraph lines, such temporary or permanent inclined planes, arches, tunnels, culverts, embankments, aqueducts, bridges, roads, lines of railway, ways, passages, conduits, drains, piers, cuttings and fences as the Railway Administration thinks proper"

(2) The exercise of the powers conferred on a Railway Administration by sub-S. (1) shall be subject to the control of the Governor General in Council."

It appears from Ex. 1 that the scheme for the Bombay Port Trust Railway, to run from Sion down the east side of the island to the Ballard Pier and to be constructed and worked by the defendant Company, was prepared by the Company with the approval of the Secretary of State on the recommendation of the Government of India. The plan put in with Ex. A shows the level crossing in question as part of this scheme. The learned trial Judge held that applying the statutes to the admitted facts the defendant Company could make its private terms with the Municipality or it could acquire the portion of the street it needed under the Land Acquisition Act, but until it had done one or the other it was a trespasser on Municipal land. His reasoning was: The public street is immovable property not belonging to the defendant Company and subject to the Land Acquisition Act. Therefore the defendant Company cannot exercise the power given by S. 7, Railways Act, without first acquiring a portion of the street, which they have not done.

We are unable to agree with this view of the law. Where a Railway Company wishes to lay a line of railway upon and across a street it is neither necessary or appropriate to proceed under the Land Acquisition Act for the acquisition of the land. If the Government under S. 7 of that Act were to direct the Collector to take order for the acquisition of the land, he would make his award and take possession and the land would then vest absolutely in Government for the Railway Company free from all incumbrances. The land would then cease to be portion of the street and the Railway Company would be unable to exercise the power given to it of constructing the railways upon and across the "street."

The differences in the English and Indian statute law upon the subject of railway construction are differences of procedure which do not render English decisions inapplicable to this case. In England the special undertaking is sanctioned by a special Act of Parliament; in India, by the sanction of the Governor-General through the Home Department. S. 6, Railways Clauses Consolidation Act, 1845, provides that "in exercising the power given to the Company by the special Act to construct the railway and to take lands for that purpose the Company shall be subject to the provisions and restrictions contained in this Act and the Lands Clauses Consolidation Act," while the provisions of the special Act incorporate both the Lands Clauses and the Railways Consolidation Acts, for an example: see *Abraham v. G. N. Ry. Co.* (2). The provisions of the Lands Clauses Act with regard to compulsory acquisition as interpreted by the House of Lords in *G. W. Ry. Co. v. S. & C. E. Ry. Co.* (3) are substantially of the same extent as those under the Land Acquisition Act, 1890, as interpreted by S. 3 (a) and (b), for Lord Watson at p. 800 said: "Taking that Act (the Lands Clauses Act) per se, and irrespective of the terms of any other statute, these clauses do not appear to be applicable to the compulsory taking of an easement, at least in the sense in which the respondents are by their act empowered to purchase and take such a right. The only easements which these provisions, read by themselves, seem to contemplate are servitude rights burdening the corporeal lands taken by the Company, which are destroyed or impaired by the construction of the railway. The Company are not dealt with as being either entitled or bound to purchase and take such easements, but as liable to make compensation in respect of their having by the construction of their authorized works injuriously affected the dominant land to which the easements are attached. As for the land upon which the railway is to be constructed, the compulsory clauses of the General Act contemplate that the Company shall take the soil itself, and not a mere right to use

it in perpetuity." To the same effect is Lord FitzGerald's opinion expressed on p. 792.

The effect of S. 289, Bombay City Municipal Act, vesting all public streets, pavements, stones and other materials in the Corporation and under the control of the Commissioner is only to vest in that body such property as is necessary for the control, protection and maintenance of the street as a highway for public use: see *Tunbridge Wells Corporation v. Baird* (4).

The Judicial Committee have held that a Municipality in whom public ways were vested was not entitled to compensation in respect of portions of such ways taken by a tramway company under statutory powers: see *Municipal Council of Sydney v. Young* (5).

Reference has been made for the respondents to S. 290, Municipal Act, which provides that whenever any public street or part of it is permanently closed the site may be disposed of as land vesting in the Corporation. That position does not arise in the present case but, when it does arise it may have to be determined what it is that the Corporation is disposing of.

It is well established that a Railway Company, acting under S. 16, Railways Clauses Consolidation Act, 1845, (upon which S. 7, Railways Act is closely modelled), by constructing a railway upon and across part of the bed of a navigable river or across a highway is doing what if done by an unauthorized person would be indictable as a nuisance: see *Abraham v. G. N. Ry. Co.* (2) and *Oliver v. N. E. Ry. Co.* (6). In the latter case the trial Judge told the jury that as to the duty of the Railway Company with regard to the rails at the level crossing they must consider the case as if the Company had the express sanction of an Act of Parliament to put the rails there. In such a case the Company would have power to put down such rails as are necessary for the purposes of the line, but the rails must be laid and kept so as to cause as little injury or danger as possible. A rule for new trial on the ground of misdirection was discharged. For a general statement of

(2) [1851] 16 Q. B. 586=20 L. J. Q. B. 322=15 Jur. 855=117 E. R. 1004=83 R. R. 620.

(3) [1884] 9 A. C. 787=53 L. J. Ch. 1075=51 L. T. 798=32 W. R. 957=48 J. P. 821.

(4) [1896] A. C. 434=65 L. J. Q. B. 451=74 L. T. 385=60 J. P. 788.

(5) [1898] A. C. 457=67 L. J. P. C. 40=78 L. T. 365=46 W. R. 561 (P.C.).

(6) [1874] 9 Q. B. 409=43 L. J. Q. B. 198.

the obligations of persons interrupting highways under statutory authority, see the judgment of Moulton, L. J., in *Hertfordshire County Council v. G. E. Ry.* (7).

In a case analogous to the present where the Corporation of a borough, being empowered by a local Act which incorporated the Lands Clauses Acts, to erect and maintain "on, in, over or under" any street in which their tramways were laid poles and posts for the purpose of working the tramways by mechanical power, erected a post for that purpose in the pavement of the street, which at that point was the property of a neighbouring owner, subject to the right of the public to use the same as a footpath, it was held that the Corporation were not taking the land within the meaning of S. 189, Lands Clauses Act, 1845, but were merely exercising statutory power in the nature of an easement, and an action for trespass could not be maintained against them: see *Escott v. Newport Corporation* (8).

The case of *Rangleley v. The Midland Railway Company* (8), referred to by the learned trial Judge and relied upon by the respondents, decided that a Railway Company could not dedicate to the public the surface of a neighbour's land without first acquiring it under the Lands Clauses Act. It does not appear to us to support the plaintiff's position.

The statutory authority under S. 7, Railways Act, to lay the railway across the street without resort to the Land Acquisition Act being, in our opinion, established, the application of S. 293, City of Bombay Municipal Act, is excluded by the words "notwithstanding anything in any other enactment for the time being in force." The Railways Act, S. 16, overrides the Municipal Act and the sole control over the Railway Administration is vested in the Governor-General: see S. 16 (2) and *Municipal Commissioner of Bombay v. G. I. P. Ry.* (9). The evidence so far as it goes indicates that the railway across the

Sewri Koliwada Road has the approval of the controlling authority.

We, therefore, reverse the decree of the lower Court and allow the appeal, dismissing the suit with costs throughout.

Batchelor, J.—I quite agree.

G.P./R.K.

Appeal allowed.

A. I. R. 1914 Bombay 107

HEATON AND SHAH, JJ.

Shidappa Bapu Biradkar and others
—Defendants—Appellants.

v.

Ningangauda Siddangauda and others
—Plaintiffs—Respondents.

Second Appeal No. 103 of 1913, Decided on 29th July 1914, from decision of District Judge, Bijapur, in Appeal No. 64 of 1911.

Hindu Law—Adoption—Widowed daughter-in-law can validly adopt with consent of mother-in-law.

Under Hindu Law widowed daughter-in-law, that is to say, the widow of a predeceased son can make a valid adoption with the contemporaneous consent of her mother-in-law in whom the estate of the last full owner is vested as an heir. [P 108 C 1]

Nilkonth Airmaram—for Appellants.

Setlur and P. D. Bhide—for Respondents

Shah, J.—The facts out of which this second appeal arises are few and undisputed. One Ramangauda had a son Ningangauda, who died during his lifetime leaving a widow Shidava. Thereafter Ramangauda died leaving a widow Avabai, who inherited the property of her husband. In 1878 Shidava adopted Shidappa with the consent of Avabai, in whom the estate was vested at the time as the heir of the last full owner. Shidava died in 1904. Avabai apparently had predeceased Shidava. The present plaintiff, who is the adopted son of Shidappa, claims to be the owner of the property in suit, while the defendants claim the property as the reversioners of Ramangauda. It is common ground that the plaintiff is entitled to succeed if the adoption of Shidappa by Shidava is valid. The lower Courts have held the adoption to be valid, mainly relying upon the case of *Payapa v. Appanna* (1).

In the appeal before us, the same question has been raised, and it is argued on behalf of the defendants that the adoption by Shidava is invalid as

(1) [1899] 23 Bom. 327.

(7) [1909] 2 K. B. 403=78 L. J. K. B. 1076=101 L. T. 213=78 J. P. 353=7 L. G. R. 1006=53 S. J. 575=25 T. L. R. 573.

(8) [1904] 2 K. B. 369=73 L. J. K. B. 693=68 J. P. 135=52 W. R. 543=90 L. T. 343=20 T. L. R. 159=2 L. G. R. 779.

(9) I. O. 281=11 Bom. L. R. 1181=34 B. 252.

the adoption is not to the last full owner and that the consent of Avabai cannot validate it. In other words, it is contended that the case of *Payapa v. Appanna* (1), which is admittedly on all fours with the present case is not correctly decided. It is conceded and I think rightly conceded that there is no decision of this Court or of the Privy Council which is in conflict with *Payapa's* case (1). But Mr. Nilkanth has relied upon certain dicta in *Shri Dhar-nidhar v. Chinto* (2), *Ramachandra v. Mulji Nanabhai* (3), *Ramkrishna v. Shamrao* (4) and *Datto Govind v. Pandurang Vinayak* (5), as showing that the decision in *Payapa's* case (1) cannot now be accepted as a binding authority. He has also drawn our attention to the criticism on these cases in paras 194 and 195 of Mayne's Hindu Law (Edn. 8, pp. 255-258).

In dealing with these cases it is necessary to bear in mind the particular facts of each case, and the point for decision with reference to which the observations must be deemed to have been made. It is also necessary to remember that a case is only an authority for what it actually decides and that it cannot be quoted for a proposition which may seem to follow logically from it. Viewed in this light it is clear that *Payapa's* case (1) is an authority for the proposition that a widowed daughter-in-law (I mean the widow of a pre-deceased son) can make a valid adoption with the contemporaneous consent of her mother-in-law in whom the estate of the last full owner is vested as an heir. We are not concerned in this case with the exact scope of the general propositions enunciated in the case as third and fourth exceptions to the rule by Ranade, J. The observations in the two earlier cases were obiter dicta and considered by the Court which decided *Payapa's* case (1). The Full Bench ruling in *Ramkrishna v. Shamrao* (4) does not touch the point actually decided in *Payapa's* case (1). The Full Bench considered the question of the power of the grandmother to make a valid adoption and held that her power to adopt was at an end

when her son died leaving a grandson as his heir.

The considerations which would apply to the limited proposition with which we are concerned in this appeal and with which the learned Judges in *Payapa's* case (1) were concerned would be quite different and so far as I can see, there is nothing in the Full Bench case which is in conflict with the main ground of *Payapa's* decision (1). The same may be said of the case of *Datto Govind v. Pandurang Vinayak* (5) in which as I read the observations of Chaubal, J., it was merely suggested that the general propositions stated as the third and fourth exceptions to the ordinary rule were not universally true and could not apply to certain widows adopting under certain conditions. In any case I see nothing in these two cases which is in conflict with the decision in *Payapa's* case (1). On a careful consideration of the arguments urged by Mr. Nilkanth, I am unable to see any reason to dissent from the decision in *Payapa's* case (1).

I consider it essential that a rule affecting the devolution of property after it is laid down definitely and and clearly should not be lightly disturbed unless there are clear and cogent reasons to do so. *Payapa's* case (1) was decided in 1898. Mr. Justice Ranade then observed as follows (p. 332): "Nothing is more common in this country than to find that parents, when they grow old and have the misfortune of losing an only son in their old age, leaving a young widow behind, think it their duty to console that widow for the loss she has suffered by permitting her to adopt a son in preference to adopting a son themselves." To adopt any other view now would have the effect of unsettling many titles settled on the footing of *Payapa's* case (1). I would, therefore, follow the decision in *Payapa's* case (1).

Apart altogether from *Payapa's* case (1), I see nothing in such an adoption as we have in this case which is opposed to the Hindu sentiment or Hindu usage or any specific and inflexible rule of Hindu Law. In this case Avabai was unquestionably competent to adopt to Ramangauda at the time when she consented to Shidapa's adoption by Shidava and to defeat the rights of the

(2) [1896] 20 Bom. 250.

(3) [1898] 22 Bom. 558.

(4) [1902] 26 Bom. 526=4 Bom. L. R. 315.

(5) [1908] 32 Bom. 499=10 Bom. L. R. 692.

reversioners. Instead of following that method of 'doing so, she allowed her daughter-in-law to do so giving her consent to the adoption at the time. It matters nothing to the reversioners whether their rights are defeated by the adopted son of the last full owner or of a predeceased son of the last full owner. The rule as to the adoption being to the last full owner for the purposes of inheritance is subject to certain exceptions. For instance, a mother is allowed to adopt, though her adoption is not to the last full owner so as to enable the adopted son to inherit the property of her son. An exception in favour of the widow of a predeceased son when she adopts with the contemporaneous consent of her mother-in-law seems to be just and in accordance with Hindu Law. The result, therefore, is that the decree of the lower appellate Court is confirmed with costs.

Heaton, J.—I concur. I do not wish to express any opinion at all on the general principles which were discussed and which it is far from easy to determine, but I am quite satisfied that in this case we should decide as was done in *Payapa's* case (1).

G.P./R.K. *Decree confirmed.*

A. I. R. 1914 Bombay 109 (1)

SCOTT, C. J. AND BEAMAN, J.

Bapu—Appellant.

v.

Vithal—Respondent.

Second Appeal No. 641 of 1913, Decided on 16th July 1914.

Decree—Consent.

A decree made by consent can only be varied by consent. [P 109 C 1]

Judgment.—In this case the mortgagor has bound himself to pay the amount of the decree within a certain time by certain instalments. It was a consent decree, not a decree framed by the Court in its discretion under the Dekkhan Agriculturists' Relief Act, and we see no reason why the mortgagor should not be held to the terms upon which the decree was passed with his consent. It has been held by North, J., in *Australasian Automatic Weighing Machine Co. v. Walter* (1) that a decree made by consent can only be varied by consent. Here the decree-holder claims

that the decree should be enforced according to its terms. We think he is entitled to an order for its enforcement accordingly. We set aside the decree of the lower appellate Court and decree that the *darkhast* should be carried out as prayed by the applicant. Costs upon the opponent throughout.

G.P./R.K.

Decree set aside.

A. I. R. 1914 Bombay 109 (2)

MACLEOD, J.

Amirbibi—Plaintiff.

v.

Azizabibi and others—Defendants.

Original Suit No. 29 of 1914, Decided on 19th September 1914.

Mussalman Wakf Validating Act (1913)—Act has no retrospective effect.

The Mussalman Wakf Validating Act, 1913, refers solely to wakfs created after the Act, and has no retrospective effect. [P 110 C 2]

Mulla and Mirza—for Plaintiff.

Jardine (Advocate)—for Defendants.

Judgment.—One Shaik Abdulla bin Shaik Ebrahim, a Sunni Mahomedan, died at Bombay on or about 14th August 1906, leaving him surviving as his only heirs according to Mahomedan law two daughters, Amirbibi and Azizabibi. By a deed-poll dated 23rd March 1901 the said Shaik Abdulla declared in effect that he held certain property belonging to him in Huzaria Street in wakf as a mutawali or trustee upon the trusts following, viz. :

"(a) Out of the net rents of the said property to feed five fakirs every Friday night, to pay for reading the Quoran every month and for Fatiha ceremonies in the months of Muharram, Rabiulakhir, Rajab and Ramzan and for offering every month oil two and a half seers for lighting the masjid situated in Huzaria Street.

"(b) To pay the balance of the said rents to his daughters and any other child that might thereafter be born to the settlor in equal shares for their maintenance and the maintenance of their children therein named, and after the death of his daughters to pay the same to defendant 2 and the said Yakubkhan and Dawoodkhan and their descendants generation after generation as well as the settlor's descendants, male or female, generation after generation.

"(c) On failure of descendants to use the balance of the said rents for the

(1) [1891] A. W. N. 170.

benefit of the settlor's community or for meritorious acts or for the use of the said masjid as the trustee for the time being might think proper."

The annual gross income of the property is said to be Rs. 960 and the annual net income about Rs. 800. The amount required for the purposes set forth in sub-Cl. (a), para. 2, of the plaint is said to be about Rs. 64.

The plaintiff, as one of the daughters of the deceased, has filed this suit against her sister and her sister's son and the Advocate-General, praying that it may be declared that the said deed-poll is void and of no effect and that the plaintiff and defendant 1 as the sole heirs of the said Shaik Abdulla are absolutely entitled to the said immovable property.

The deceased had executed a similar deed-poll in respect of another property on the same day and that deed-poll was the subject-matter of Suit No. 857 of 1911, in which a decree was passed on 13th February 1912 by Beaman, J., by which it was declared that the deed of settlement mentioned in the plaint was null and void except as regards the charities mentioned in Ex. B to the plaint. The decree further ordered that plaintiff and defendant 1 should invest a certain sum to provide for those charitable purposes, and declared that when they had so done they would be absolutely entitled to the immovable property mentioned in the deed.

It cannot be doubted that under the decisions of the Privy Council, the deed in this suit would have to be declared to be void except as regards the charities mentioned in sub-Cl. (a) para. 2 of the plaint. But it has been contended that those decisions no longer apply now that the Mussalmans Wakf Validating Act, 6 of 1913, has been passed. It is argued that the effect of that Act is retrospective and that all deeds of wakfs hitherto created which might be declared void and of no effect, if brought before the Courts, are now made good, and there is some ground for that argument in the preamble of the Act. But there is a distinct conflict between the preamble of the Act and the Act itself. The preamble runs as follows :

"Whereas doubts have arisen regarding the validity of wakfs created by persons professing the Mussalman faith

in favour of themselves, their families, children and descendants and ultimately for the benefit of the poor or for other religious, pious or charitable purposes; and whereas it is expedient to remove such doubts; it is hereby enacted."

A preamble sets forth the reason for the particular Act of the legislature and foreshadows what is intended to be effected by the Act. But to see what has been actually effected by the Act, one must look to the Act itself, and the Act seems to have failed entirely to produce the effect which, it might be gathered from the preamble, was intended, that is to say, intended, according to the construction put upon it by the Advocate-General. The word "created" in the preamble might be read as including, not only wakfs to be created in the future, but also wakfs already created in the past. It may have been the intention to validate all wakfs which could be set aside under the previous decisions of the Privy Council when they came before the Courts, or it may have been intended that if such wakfs were created in future, they would under the Act be held good. These are the alternative constructions which can be applied to the preamble. Then turning to the Act itself, it curiously enough does not provide, as is usually the case, for the date on which the Act shall come into force. Therefore I presume the Act came into force on the day it received the assent on the Governor-General in Council. The Act refers solely to wakfs which shall be created in the future. S. 3 says: "It shall be lawful for any person professing the Mussalman faith to create a wakf which in all other respects is in accordance with the provisions of Mussalman law, for the following among other purposes."

There is nothing in the Act about wakfs which are already in existence when the Act was passed, and there is nothing in the Act which enables me to hold that the provisions of the Act shall apply to such wakfs; and therefore in my opinion whatever the intention of the legislature may have been, it has by this Act only enabled Mahomedans in future to create wakfs by deeds which, under the previous decisions, would be liable to be set aside as contrary to the provisions of Mussal-

man law, and therefore as regards this wakf which was created in March 1901, the old law applies. As the deed is clearly intended to effect a permanent settlement of the property on the settlor's descendants and the ultimate gift to charity is purely illusory, the deed must be set aside except as regards the charities referred to above which can be given effect to.

It has been arranged between the Advocate-General on the one hand and the plaintiff and the defendants on the other hand that Government promissory notes of the nominal value of Rs. 2,400 should be purchased and should be settled in trust to provide for those charitable purposes. After that has been done, the property will be declared the absolute property of the plaintiff and defendant 1.

Costs will come out of the settled property, those of defendant 3 as between attorney and client.

G.P./R.K.

Deed set aside.

A. I. R. 1914 Bombay 111 (1)

SCOTT, C. J. AND BATCHELOR, J.

Raoji Keshav Deshmukh—Defendant—Appellant.

v.

Krishnarao Anandrao — Plaintiff — Respondent.

First Appeal No. 184 of 1911, Decided on 26th March 1914. against decision of Addl. First Class Sub-Judge, Nasik, in Appeal No. 556 of 1910.

Limitation Act (9 of 1908), S. 5—Judge provisionally admitting appeal to file competent to decide question of extension of time.

Where a Judge has provisionally admitted an appeal to the file in the absence of the respondent, there is no objection to the Judge entertaining and deciding at the hearing the question whether there was sufficient cause under S. 5, Lim. Act for extending time for filing the appeal. [P 111 C 1]

R. R. Desai—for Appellant.

G. S. Rao—for Respondent.

Judgment.—We cannot say that as a matter of law there was sufficient cause for extending the time under S. 5, and we do not think there was any objection to the learned Judge entertaining the question after he had provisionally admitted the appeal to the file in the absence of the respondent. We are of opinion that this is a second appeal and not a first appeal, because it is an appeal from a decree of an appel-

late Court. We dismiss the appeal with costs.

G.P./R.K.

Appeal dismissed.

A. I. R. 1914 Bombay 111 (2)

SCOTT, C. J., AND SHAH, J.

Harchand Panaji—Plaintiff—Appellant.

v.

Gulabchand Kanji—Defendant—Respondent.

Second Appeal No. 640 of 1913, Decided on 20th July 1914, against First Class Sub-Judge, Surat, in Appeal No. 27 of 1912.

Civil P. C., S. 13—Decree of foreign Court—Acquiescence by judgment debtor—Decree can be executed in British India.

A decree passed against a person who voluntarily submits to the jurisdiction of a foreign Court can, on transfer, be executed in the Court within whose jurisdiction he resides. [P 112 C1]

T. R. Desai—for Appellant.

G. N. Thakore—for Respondent.

Judgment.—The lower Courts have declined to execute a decree of a Baroda Court against the respondent's father, Kanji Kapura, which had been transferred for execution against his estate to the Court of the Second Class Subordinate Judge of Surat.

The learned Judge of the lower appellate Court states that it was conceded that, on the principles of international law as laid down in *Sirdar Gurdial Singh v. Raja of Faridkot* (1), the decree would have been a nullity had the defendant not appeared and defended the suit in the Baroda Court, and that it was argued before him that the defendant had voluntarily submitted to the jurisdiction by employing a pleader to defend the suits. As to this the learned Judge of the lower appellate Court says that the defendant protested against the right of the Baroda Court to entertain the suit at the earliest opportunity and did not make any other defence.

We have referred to the statement of the pleadings and issues in the Baroda Court and find that the statement of the lower appellate Court is incorrect.

The defendant pleaded, first, that the plaintiff had no right to sue as the sum claimed was vested in him by inheritance as the brother of the plaintiff's father's deceased brother's widow.

(1) [1895] 22 Cal. 222=21 I. A. 17=4 M. L. J. 267 (P. C.).

Secondly, that, if not, the suit was defective for want of parties as the other brothers of the plaintiff's father were not joined. Thirdly, that the plaintiff's suit could not be entertained as the money dealings relied on took place outside the jurisdiction of the Courts. Fourthly, that the plaintiff's suit would not lie in that Court as the defendant had no property and did not reside or carry on business in Baroda territory. Fifthly that the suit was time barred.

Upon this defence four issues were raised :

1. Is the suit defective for want of parties ?
2. Is the suit barred by time ?
3. Does the suit lie in the Court ?
4. What relief should be granted to the plaintiff ?

All the issues were decided in the plaintiff's favour after evidence had been adduced by both sides.

The case appears to us to be clearly one of voluntary submission to the jurisdiction, the defendant taking his chance of getting a decree in his favour : see *Boissiere & Co. v. Brockner & Co.* (2) and *Voinet v. Barrett* (3). The case is a stronger one in favour of the appellant than that of *Parry & Co. v. Appasami Pillai* (4), relied on in the lower Courts, for there was no preliminary decision of the question of jurisdiction on the protest of the defendant and no circumstance of pressure such as the Madras Court thought existed in *Parry & Co. v. Appasami Pillai* (3).

We set aside the decree of the lower appellate Court and return the *darkhast* for execution of the Baroda Court's decree in the Court of the Second Class Subordinate Judge of Surat.

The respondent must pay the costs of his opposition to the *darkhast* up to date.

G.P./R.K.

Decree set aside.

A. I. R. 1914 Bombay 112

SCOTT, C. J., AND DAVAR, J.

Bai Fatma—Plaintiff—Appellant.

v.

Rander Municipality — Defendant—Respondent.

Second Appeal No. 383 of 1913, Decided on 4th March 1914, from decision of District Judge, Surat.

Bombay District Municipal Act (1911), S. 92—Application for permission to rebuild house granted subject to condition of leaving space for improvement of public road—No regular line determined for existing street or contemplated street—House built in contravention of conditions—Owner held entitled to injunction against Municipality from pulling down house.

On an application under the Bombay District Municipal Act (3 of 1901), for permission to rebuild a house, the permit was granted subject to the condition of keeping an open space so as to leave a width of road considerably more than the width of the public road at that locality for the improvement of the said public road. No regular line had been determined either for the existing street or for the future as contemplated in S. 93 of the Act.

Held : that under the circumstances a set-back could not be obtained under S. 92 and that the owner of the house was entitled to an injunction restraining the Municipality from pulling down the house built in contravention of the condition laid down by it. [P 113 C 1]

Inverarity and Manubhai Nanabhai—for Appellant.

Strangman and M. K. Mehta—for Respondent.

Judgment.—The plaintiff being the owner of a house in Rander applied to the Municipality for permission to rebuild it on 25th April 1911. The Municipality, in reply to her application on 5th June 1911 prescribed conditions, presumably under S. 96 (2), District Municipal Act. The permit was granted to her, subject to conditions noted on the back, for pulling down the building and building a new building on the land by keeping a space so as to leave a width of road 14 feet and a half on the south side of the building, in pursuance of the order passed by the Managing Committee on 6th May 1911, and the first condition of the permit is that "For the improvement of the said road you must leave on that side a space in length and in width 14 feet and build the house" and seventh condition states: "As your building stands on the public road you should take precautions to see that the water from your roof does not fall upon persons passing by that way."

(2) [1889] 6 T. L. R. 85.

(3) [1885] 55 L. J. Q. B. 39=34 W. R. 161.

(4) [1878-1880] 2 Mad. 407.

Now the public road at the time of the permit was considerably less than 14 feet namely, 8 feet 4 inches. The power of the Municipality under the section to prescribe the location of the building is given in relation to "any street existing or projected as they think proper." They have prescribed the location of the building in relation, not to the existing street, but to a street which may come into existence in the future. But we do not think that on the admitted facts it can be said that there is a projected street 14 feet in width, for there is no regular line determined either for the existing street or for the future as contemplated in S. 92. The permit clearly shows that the first condition is not for the purpose of sanitation or for the purpose of ventilation, but simply for the improvement of the street by widening it, and the object is to get a set-back which cannot be obtained under S. 92, because the conditions contemplated in that section do not yet exist. The result is that if the condition of the permit were complied with the plaintiff would have to give up or keep vacant and unproductive a considerable portion of her land, and the Municipality would have the opportunity of paying compensation for it at any time they might feel disposed to do so, which would be contrary to the provisions of S. 92 which contemplate that when a set-back is determined upon, compensation shall be paid to the owner. The case is very similar to *Queen-Empress v. Veeramlmal* (1).

We think that the plaintiff is entitled to the relief which she prays, namely an injunction restraining the defendants from pulling down the building or any portion thereof, or from putting in force their notice of 12th September 1911. The defendants must pay the costs throughout. The decree of the lower appellate Court is set aside

G.P./R.K.

Decree set aside.

A. I. R. 1914 Bombay 113

BEAMAN AND HEATON, JJ.

Sundra Bahu Shetye — Defendant — Appellant.

v.

Sakharam Gopalshet and others — Plaintiffs—Respondents.

First Appeal No. 146 of 1913, Decided on 8th July 1914, from the decision of Asst. Judge, Ratnagiri, in Civil Suit No. 128 of 1912.

Civil P. C. (1908), S. 11 — If plaintiffs in second suit were minors at time of first suit and were not adequately represented or if plaintiff was pro forma defendant in first suit, second suit is not barred.

Section 11, Civil P.C. does not bar a suit only on the ground of the matter in suit having been substantially in issue in a previous suit, if the plaintiffs in the second suit were minors at the time of the first and were not adequately represented or if the plaintiff was a pro forma defendant in the first suit and took no active part in that suit. [P 113 C 1]

V. R. Sirur—for Appellant.

K. N. Koyajee—for Respondents.

Judgment.—The plaintiffs, three in number, in this suit are seeking to obtain property, from the defendant appellant, granddaughter of one Tukaram on the ground that Tukaram and their ancestors were joint. The only question which we have to answer here is, whether the matter in issue is res judicata by reason of the decision in a suit of 1909, in which the present plaintiff 1 was defendant 4, and the father of the present plaintiffs 2 and 3 was plaintiff. Doubtless we should have been glad to hold that the matter was res judicata, although the position occupied by plaintiff 1 in that suit might have occasioned some difficulty, for there can be no doubt but that the matter substantially in issue here was substantially in issue there and was decided against the father of the present plaintiffs 2 and 3. Unfortunately plaintiffs 2 and 3 were not made parties to that suit. Still the matter might have been res judicata against them under the principle, and we think, also the words of S. 11, Civil P. C., which has recently been interpreted in this sense by their Lordships of the Privy Council in the case of *Raja Rampal Singh v. Ram Ghulam Singh* (1) had it not been for a very important circumstance which distinguishes this case from cases falling in that general class. Here plain

(1) [1898] 16 Mad. 230=1 Weir 733.

(1) [1905] 32 I. A. 17=(1905) 27 All. 37=2 A. L. J. 237 (P. C.).

tiffs 2 and 3 were minors at the time of the suit of 1909, and the finding of the learned Judge who tried that suit shows conclusively that the father of these minors did not adequately represent them. He comments most adversely upon the manner in which the suit was conducted before him and makes the conduct of these plaintiffs' father the ground of saddling the defendants in spite of their success with their own costs. In these circumstances we feel that it would be impossible to say that these minors, who were not parties to that suit and are judicially declared not to have been adequately represented at the trial, are bound by its result. They are therefore at liberty to proceed with the present litigation, and since plaintiff 1 was no more than a pro forma defendant in the former suit, and appears to have taken no active part in it, and the decree, speaking generally, appears to have been in his favour as one of the defendants, we feel some doubt in holding that he is bound by the result either, to the extent of being precluded from prosecuting this litigation. We must, therefore confirm the decree of the Court below upon this preliminary point and remand the case to be dealt with upon the merits. Costs, costs in the cause.

G.P./R.K.

*Decree confirmed.***A. I. R. 1914 Bombay 114**

SCOTT, C. J. AND BATCHELOR, J.

Kishorbhai Revadas—Plaintiff—Appellant.

v.

Ranchodia Dhulia and others—Defendants—Respondents.

Second Appeal No. 110 of 1912, Decided on 27th January 1914, from decision of Small Cause Court Judge, Umreth, in Civil Suit No. 491 of 1927.

(a) Probate—Revocation application on ground of fraud dismissed by District Judge—Party is barred from raising the same question in suit by executor to recover estate relating to probate—Evidence Act S. 44.

Where the application for revocation of probate on the ground of fraud and collusion has been disallowed by the District Court, the party applying will be barred by the decision in the revocation matter from raising again the same question in a suit by the executor to recover the estate to which the probate relates.

[P 115 C 1, 2]

(b) Executor—Demand by executor claiming title under unrevoked will—Debtor to the estate has no answer.

Where demand is made by the executor claiming title under unrevoked probate, a debtor to the estate has no answer, unless possibly he is sued in a Court having jurisdiction to revoke the probate. [P 116 C 2]

(c) Probate—Sub-Judge's Court cannot deal with question of probate.

A Subordinate Judge's Court has no jurisdiction to deal with the question of probate.

[P 115 C 1]

Jayakar and B. F. Dastur—for Appellant.

V. J. Patel and M. K. Mehta—for Respondent.

Judgment.—This suit was instituted by Kishorbhai Revadas, the executor, who had obtained probate of the will of Jijibhai Kasandas, to recover from defendant 1 Rs. 144 as rent of certain fields occupied by him as yearly tenant and possession of those fields.

The defence of defendant 1 was that the deceased Jijibhai had asked him to pay the rent to his nephew Jivabhai, who was defendant 2 in the case, and defendant 2, Jivabhai contended that the deceased made no will and that the will proved was a fabrication.

Defendant 2, prior to the institution of this suit on 2nd March 1905 made an application to the District Court for revocation of the probate granted to the plaintiff upon the ground that the will was a forgery, and that he (defendant 2) had been prepared to prove it in the probate proceedings, but at the last moment the plaintiff had bought him off, and that a mutual arrangement had been effected whereby defendant 2 agreed not to cross-examine the plaintiff's witness and to call evidence and thus facilitated the grant of probate to the plaintiff who would otherwise have been prosecuted for forgery on the strength of the Mamlatdar's report, and in consideration of the withdrawal of his opposition the plaintiff agreed to restore the property of the deceased to him (defendant 2), or to pay the equivalent in cash directly the probate had been granted, but after the order had been passed the plaintiff declined to carry out his part of the arrangement and thus committed a fraud on the one hand upon the Court and on the other on him (defendant 2) and that therefore the probate should be revoked. The application for revocation was dis-

posed of by the District Court on the ground that defendant 2 on his own showing was a party to a fraud upon the Court, that he had not come with clean hands and was not therefore entitled to the relief sought.

Defendant 1, as I have stated, claims to be entitled to pay rent for the property to defendant 2. He therefore claims under him since the death of the testator.

Defendant 2 in this suit has taken advantage of defendant 1 claiming under him to put forward the same grounds as he put forward in the application for revocation, and the Subordinate Judge who tried the case in the first instance, and the Subordinate Judge, with appellate powers, who tried the case in appeal, having gone into the questions of fraud, which the District Court declined to entertain upon the revocation application, have found that the will was a forgery, and that the probate granted by the District Court is of no avail to enable the plaintiff to recover from defendant 1 the property of the deceased.

This investigation was permitted in the lower Courts upon the strength of S. 44, Evidence Act, which states that "any party to a suit or other proceeding may show that any judgment, order or decree which is relevant under Ss. 40, 41 or 42 and which has been proved by the adverse party, was delivered by a Court not competent to deliver it, or was obtained by fraud or collusion."

Now the party who seeks to prove the fraud and collusion vitiating the decree of the Probate Court, under which probate was granted to the plaintiff, is defendant 2, and defendant 2 has already raised that question in the only Court which was competent to decide it, namely, the District Court, for the Subordinate Judges who tried the present case have no jurisdiction in probate matters, and the Court competent to decide it dismissed the application, for the reasons which I have already stated. It was an application in the nature of a suit, as all contested probate proceedings are, and the decision could have been appealed from by defendant 2, and if the learned District Judge was held to be wrong in rejecting the application upon the grounds upon which he had rejected it, the result would have been

that those allegations of fraud would have been investigated by a Court competent to give effect to its findings. Defendant 2, therefore is we think, barred by the decision of the District Court in the revocation matter from raising again the same question in the Court of the Subordinate Judge.

As regards defendant 1, he does not raise these questions by his pleading, although he has made common cause with defendant 2 in his defence. As regards him, it is not disputed that he is in possession of property forming part of the estate of the deceased, and the plaintiff seeks to recover possession of that property for the estate as its representative. The defendant does not dispute that he is liable to pay rent for his occupation at a rate which is not exceeded in the demand in this suit.

Now where the demand is made by the executor claiming title under an unrevoked probate, a debtor to the estate has no answer, unless possibly he is sued in a Court having jurisdiction to revoke the probate. What would have been the result of this common defence if it had been put forward in the District Court is a question which is not free from difficulty and which we have not to decide in the present case. But we think it is clear that in the Subordinate Judge's Court, which has no jurisdiction to deal with the question of probate, the title of the plaintiff was conclusively proved by the production of the probate, and it was no valid defence on the part of defendant 1 to join in the allegation of defendant 2 that the will was a forgery and that the probate had been obtained by fraud and deception.

Section 59, Probate, Act says that "Probate shall be conclusive as to the representative title against all debtors of the deceased and all persons holding property which belongs to him, and shall afford full indemnity to all debtors paying their debts and all persons delivering up such property to the person to whom such probate or Letters of Administration shall have been granted." Therefore, defendant 1, in complying with the demands of the plaintiff would have been fully indemnified as against all persons entitled to share in the estate of the deceased.

The English cases afford illustrations of the rule stated in S. 59, Probate Act. *Allen v. Dundas* (1) decides that "payment of money to an executor who has obtained probate of a forged will, is a discharge to the debtor of the intestate, notwithstanding the probate be afterwards declared and administration be granted to the intestate's next of kin. A probate, as long as it remains unrepealed, cannot be impeached in the temporal Courts."

In *Attorney-General v. Partington* (2) Willes, J., says: "It is only necessary to bear in mind the nature of such a grant as the act of a Court of sole jurisdiction pronouncing as to personal property to the exclusion of all other Courts upon the question of testacy and intestacy, and upon the right to receive and distribute the effects of the deceased in the event of intestacy, whether total or partial without the constat of such a Court no other Court can take notice of the rights of representations to personal property; and when such Court has by the grant of probate or Letters of Administration established the right, no other Court can permit it to be gainsaid." The last words of that quotation seem to us to be applicable to the case of a grant of probate by the District Court, which it is attempted to challenge in the Court of a Subordinate Judge. In *In re, Ivory; Hankin v. Turner* (3) Letters of Administration of the estate of an intestate were granted ex parte to the defendant, as "his natural and lawful brother of the half blood." The plaintiff, who was an uncle of the intestate, then commenced an action in the Chancery Division for the administration of the estate, alleging that the defendant was illegitimate, and that he himself was next of kin; and moved for a receiver and an injunction. It was held by Lush, J., "that the application must be refused, for that as long as the Letters of Administration remained in force they were conclusive evidence that the defendant was one of the next of kin, and that the

plaintiff's proper course of procedure was to apply in the Probate Division to have them recalled."

Whether a debtor of the deceased and one who holds property admittedly forming part of the estate would have any locus standi in applying to the District Court for revocation of the probate we need not decide. As regards defendant 2, although he had a locus standi to make an application, his right is now at an end by reason of the unsuccessful result of his application for revocation. That being so, it appears to us that defendant 1 has no defence to this suit. He will be completely indemnified by paying and delivering over the property to the plaintiff, and it is a pity that under the circumstances he should have thought fit to make common cause with defendant 2.

We reverse the decree of the lower Court and pass a decree for the sum claimed and for possession of the property in suit against defendant 1, with costs throughout payable by both defendants.

G.P./R.K.

Decree reversed.

A. I. R. 1914 Bombay 116

SCOTT, C. J., AND HAYWARD, J.

Ramdas Gopaldas Shahu—Plaintiff—Appellant.

v.

Baldevdas Kaushalyadas—Defendant 1—Respondent.

First Appeal No. 30 of 1912, Decided on 7th September 1914, against Additional First Class Sub-Judge, Ahmedabad, in Suit No. 815 of 1910.

Hindu Law — Succession — Mitakshara — Declared heir of Sanyasi under Mitakshara is virtuous pupil.

The declared heir of a Sanyasi, under the Mitakshara School of Hindu law, is a virtuous pupil.

It is doubtful whether the Bairagis can be classed as Sanyasis, because the order of Bairagis is not confined to the members of the twice born castes. [P 117 C 1]

I. N. Mehta and *N. N. Mehta*—for Appellant.

Setlur and *N. K. Mehta*—for Respondent.

Judgment.—The plaintiff sued to recover possession from defendant 1 of certain temple properties at Dakore, claiming to be the pitrai chela of the deceased Bajrangdas, who was a Mahant of the Dakore temple. Defendant 1 disputed his claim and called upon

(1) [1789] 3 T. R. 125=1 R. R. 666=100 E. R. 490.

(2) [1864] 3 H. & C. 193 at p. 204=33 L. J. Ex. 281=10 Jur. (n. s.) 825=10 L. T. (N. S.) 751=13 W. R. 54=140 R. R. 389.

(3) [1874] 10 Ch. D. 372=39 L. T. 611=27 W. R. 20.

the plaintiff to prove the claim he asserted. The parties, it is not disputed, are Bairagis belonging to the sect of Vaishnavas of the Ramanandi class. It has been laid down in *Ram Dass Byragee v. Cunga Das* (1) that in that class of Bairagis, on the demise of the superior of the mutt, when there is no chela to succeed, the heads of the mutts ordinarily elect a successor from pupils of some other teacher. (Compare replies 39 and 40 relating to Bairagis, in Borrodaile's Caste and Customs in Gujerat). That has not been done in the present case, nor has the plaintiff proved the existence of any special custom relating to the Dakore Mutt. It is contended on his behalf that Bajrangdas under whom he claims was a Sanyasi, and that he is entitled by virtue of a certain passage in the Mitakshara, Chap. 2, S. 8, para. 2, to succeed to the property of that Sanyasi. The passage is as follows: "The heir as to the property of a hermit, of an ascetic, and of a student in theology are, in order (that is, in the reverse order), the preceptor, the virtuous pupil, and the spiritual brother belonging to the same hermitage," and the three following paragraphs make it clear that the expression "in the reverse order" means that the heir of a student in theology is a preceptor, the heir of an ascetic is a virtuous pupil, and the heir of a hermit is a spiritual brother belonging to the same hermitage. But as I understand the argument which has been addressed to us on behalf of the appellant, it is contended that the plaintiff is a spiritual brother of the deceased Bajrangdas, but the deceased Bajrangdas was not a hermit, and, therefore, that class of heirs cannot be resorted to in the present case. Putting the position of Bajrangdas at its highest he was a Sanyasi and, therefore, the declared heir of the Sanyasi under the Mitakshara would be a virtuous pupil. But the plaintiff was not a pupil of Bajrangdas; therefore, he does not take as his heir according to the Mitakshara. It is, however, extremely doubtful whether the Bairagis can be classed as Sanyasis, because the order of Bairagis is not confined to the members of the twice-born castes. As to this,

(1) [1868] 3 Agra H. C. R. 295.

reference may be made to Mitakshara, Prayashchitta, Book 3, Chap. 4, Cl. 201, of the Allahabad Translation. It appears to us, therefore, that both on the ground of custom and on the ground of Hindu law the plaintiff has failed to make out his case. We therefore, affirm the decree of the lower Court and dismiss the appeal with costs.

G.P./R.K.

Decree affirmed.

A. I. R. 1914 Bombay 117

SCOTT, C. J., AND HAYWARD, J.

Valli Ise Amanji and others — Defendants—Appellants.

v.

Mahomed Adam Asmal and others — Plaintiffs—Respondents.

Second Appeal No. 59 of 1913, Decided on 2nd September 1914, from order of Dist. Judge, Broach, in Appeal No. 15 of 1913.

(a) Court-fees Act (1870), Ss. 9 and 10—Inquiry under S. 9 — Plaintiff directed to pay additional court-fee — If he fails to do so suit should be dismissed under S. 10, instead of rejecting plaint under Civil P. C. (1908), O. 7, R. 11.

If as the result of an inquiry under S. 9, Court-fees Act, a Court directs the plaintiff, if he wishes to continue the suit, to pay the required additional court-fee within the time fixed by the Court and the plaintiff fails to do so, the plaint should not be rejected under O. 7, R. 11, Civil P. C., but the suit itself should be dismissed under S. 10, Court-fees Act.

[P 118 C 1]

(b) Court-fees — Plaintiff not paying sufficient court-fee cannot be allowed to abandon part of his claim.

A plaintiff who has not properly valued his claim or paid a sufficient court-fee is not entitled at the last moment to an option to abandon part of his claim and retain only that part for which he has paid a sufficient court-fee.

[P 118 C 1]

G. N. Thakor—for Appellants.

Ramlal Ranchhoddas — for Respondents.

Judgment.—In this case we are of opinion that the order of the District Judge is wrong and must be reversed. The suit was brought in 1911, and there was a reference to a Commissioner in regard to the value of the houses and sites claimed in the suit for the purposes of court-fees. The Commissioner reported unfavourably to the plaintiffs, who however did not accept the report and obtained a further inquiry by the Court. Ultimately the Court adopted the Commissioner's valuation with some modification and directed the plaintiffs, if they wished to continue the suit, to

pay the required additional court-fee. They were given a month in which to pay that court-fee. They failed to do so. The Court then, acting under its powers under S. 10, Court-fees Act, dismissed the suit. The dismissal of the suit was of importance to the defendant, because it had only been filed just before the period of limitation elapsed for a suit of that nature, and any suit filed subsequently to the order of dismissal would be barred.

From the order of dismissal an appeal was preferred to the District Judge on the ground that the lower Court had misused its discretion in rejecting the plaintiffs' application for further time, that is to say, time beyond 13th February 1913. The learned District Judge however thought that the discretion was wisely used. So then, as far as the exercise of discretion goes, both Courts were of the same opinion. The learned District Judge however thought the order should have been in the form of rejection of plaint under O. 7, R. 11, and that there was authority contained in *Raghubans Puri v. Jyotis Swarupa* (1) to show that an option should have been given to the plaintiffs to abandon part of their claim and retain only that part for which they had paid a sufficient court-fee prior to 13th February 1913. We are of opinion that the Allahabad decision referred to does not justify the conclusion of the learned Judge, and we are not aware of any provision of law or any authority which shows that a plaintiff, who has not properly valued his claim or paid a sufficient court-fee, is entitled at the last moment to an option such as was allowed to him by the District Judge. The plaintiffs have only themselves to thank for the result of the case in the first Court. The defendants are entitled to rely upon the important benefit that they have obtained through the order of dismissal. We therefore set aside the order of the District Judge and restore that of the first Court dismissing the suit with costs. The plaintiffs must pay the costs throughout. The cross-objections are also dismissed with costs.

G.P./R.K.

*Order set aside.***A I. R. 1914 Bombay 118**

SCOTT, C. J., AND DAVAR, J,

G. K. Malvankar—Plaintiff—Appellant.

v.

Credit Bank of India Ltd.—Defendant—Respondent.Original Civil Appeal No. 20 of 1914,
Decided on 28th August 1914.

Companies Act 1882), S. 230—Deposit by agent of bank as security for proper discharge of duties — Bank to pay 6 per cent interest for use if money be not forfeited for agent's default—Agent held to be ordinary creditor in liquidation.

In the case of going bank, the bank is entitled to treat a security deposit as ear-marked for a particular purpose and refuse to deal with it for any other purpose. But in a liquidation of an insolvent bank, if the occasion for realizing the security has not arisen, and if the money has, with the consent of the giver of the security been received by the bank and mixed with its funds in consideration of an agreement to pay interest on it, the bank is only a debtor and not a trustee.

Where an agent of a bank deposited a certain sum as security for the faithful discharge of his duties and agreed that the Bank should receive and hold the money paying interest at 6 per cent for its use, the money being repayable, if not forfeited for losses occasioned through the agent's default, upon his ceasing to be the bank's agent:

Held: that in liquidation proceedings the agent could only rank as an ordinary creditor and could not take preference over other creditors of the bank. [P 119 C 2; P 120 C 1]

Setalvad—for Appellant.*Kanga*—for Respondent.

Macleod, J. — This is a summons taken out by one G. K. Malvankar, the agent of the Ahmedabad branch of the above bank against the liquidator calling upon him to show cause why he should not be directed to hand over the amount of the security deposit placed by the said G. K. Malvankar and lying with the Credit Bank of India in liquidation.

On 2nd July 1910 Jaffer Jusab, the Manager of the bank, wrote to Malvankar informing him that he had been appointed Branch Manager at Ahmedabad on a salary of Rs. 75 a month subject to the approval of the head office, and that he would have to give as security Rs. 5,000 to be deposited with the bank and also further security from the bank of Bombay for Rs. 10,000 and if the head office Manager thought it necessary a fidelity guarantee policy for Rs. 15,000,

Malvankar thereupon deposited Rs. 4,500 with the bank and acted as

Branch Manager until the winding up order was made.

According to his affidavit after he had sent Rs. 4,500 to Bombay, the Manager wanted to place the amount in fixed deposit. Whereupon Malvankar came to Bombay to protest. He was eventually given a receipt as follows on 10th July 1912:

"Received from G. K. Malvankar Rs. 4,500 only as a security deposit subject to the service regulations of this bank bearing interest at the rate of 6 per cent per annum."

He now contends that he is entitled to be paid the said sum in full in preference to the creditors of the bank, as he paid the said sum to the bank as his employee and did not pay it to the bank as customer.

His story is not quite accurate in detail. From the affidavit of the liquidator it appears that as a matter of fact Malvankar paid to the bank Rs. 2,000 on 8th July 1910, Rs. 2,000 on 9th July 1910 and Rs. 500 on 17th December 1910. The said sums were entered in the fixed deposit ledger to the credit of Malvankar as fixed deposits for twelve months at 6 per cent interest. Subsequently the whole amount of Rs. 4,500 was transferred to the security deposit account and a receipt given as above on 10th July 1912. Interest was paid from time to time to Malvankar up to 30th June 1913. In the half-yearly balance sheet the said sum was included in the item of current savings bank and other deposits. The said sum was not kept separate or invested in any particular securities, but was mixed with the other moneys of the Bank. Mr. Jinnah argued that the Rs. 4,500 was paid to the bank to be held by them upon trust, that his client was entitled to follow the trust fund in the hands of the bank, and that if the bank had mixed the trust money with its own moneys, whatever moneys were found with the bank at the date of liquidation up to Rs. 4,500 must be considered as trust money.

That argument, I think, is perfectly sound. If Malvankar had given Rupees 4,500 to the bank to be held by the bank during the period of his employment as security for his honesty and fidelity, the bank would have been bound to keep that sum separate,

and if they mixed it with their own moneys, he would be entitled to recover it out of the cash balance of the bank at the termination of his employment. But unfortunately for him this was not the arrangement he made with the bank. He agreed in effect that the bank should treat his Rs. 4,500 in the same way as money deposited by a customer. He was to receive interest on it at 6 per cent as long as he remained in the employment of the Bank. If that ceased he would be entitled to recover the principal with interest to date, provided that the bank had no claim against him in respect of defalcation or otherwise. The bank was entitled to invest the money in any way they pleased as no stipulation was made regarding the method of investment. Supposing, for instance, it had been agreed that the money should be invested in Port Trust bonds and at the date of liquidation the bank had Port Trust bonds for that amount, Malvankar would be able to claim those as belonging to him, but as the case stands I can see no difference between him and an ordinary depositor, except that the deposit was not for a fixed period but for the time he remained in the employment of the Bank. I discharge the summons, but under the circumstances without costs. The liquidator can have his costs out of the estate.

Judgment.—The appellant's claim is that he should be paid in full by the liquidator of the Bombay Credit Bank the amount deposited by him in 1910 as security for the faithful discharge of his duties as the agent of the bank's branch at Ahmedabad.

The money was originally placed by the Bank Manager to an ordinary fixed deposit account bearing interest at 6 per cent but upon objection being made by the appellant it was transferred in 1911 to the security deposit Account bearing interest at the same rate as before. There was a separate ledger kept by the bank for such accounts, and after 1911 a counterfoil receipt book, specially made out for security deposit accounts, was prepared and from it a receipt was given to the appellant for his money held at interest.

The Liquidator contends, and the learned Chamber Judge has held, that the appellant can only rank as an ordi-

nary creditor in the liquidation. The appellant contends that the money is earmarked and must be treated as trust property in the liquidator's hands. That in the case of a going bank, the bank is entitled to treat a security deposit as earmarked for a particular purpose and refuse to deal with it for any other purpose cannot be disputed, but in a liquidation of an insolvent bank the question is whether security fund can be identified and followed by the giver if the occasion for realizing the security has not arisen. If the money has, with the consent of giver of the security, been received by the bank and mixed with its funds in consideration of an agreement to pay interest on it, the bank is only a debtor and not a trustee.

We have no doubt that this is the position in the present case. The appellant agreed that the bank should receive and hold the money, paying interest at 6 per cent for its use, the money being repayable, if not forfeited for losses occasioned through the appellant's default, upon his ceasing to be the bank's agent. So thoroughly did the parties realize that the bank and the appellant were debtor and creditor, that the appellant at the desire of the bank's Manager used in rendering his accounts of his management to debit the bank with the interest on his deposit. This has been admitted by the appellant himself.

The appellant therefore can only rank as an ordinary creditor. We affirm the order of the learned Judge, which was without costs, and dismiss this appeal also without costs, as it is a test case governing several others in this liquidation.

G.P./R.K.

*Appeal dismissed.***A. I. R. 1914 Bombay 120**

BEAMAN AND MACLEOD, JJ.

Dahyabhai Motiram Bhat and others
—Defendants—Appellants.

v.

Chunilal Kishoredas Pandya and others
—Plaintiffs—Respondents.

Second Appeal No. 106 of 1913, Decided on 23rd September 1913, from decision of Joint-Judge, Ahmedabad, in Appeal No. 103 of 1911.

(a) Mahomedan Law—Pre-emption—Litigation between Hindus—Allegation by one party of adoption of Mahomedan law—Repudiation by other party—Onus of proving

adoption of as usage lies on party alleging it—Hindu law.

In litigation between Hindus, where one party alleges the adoption of a whole branch of the Mahomedan law, such as that of pre-emption and the other party repudiates the application of the foreign law, it lies very heavily on the party alleging to prove that that law has been adopted as a usage and must be proved to have been so adopted by proof of ancient and invariable custom. Where a custom of this kind is alleged as the foundation of a claim and is denied by the defendant, the trial Judge must insist upon strict proof of it.
[P 120 C 1, P 122, C 1]

The Mahomedan law of pre-emption cannot be presumed to have been adopted as part of the Customary law and usage of the Hindus of Gujarat generally.

(b) Mahomedan Law—Pre-emption—Claim of—When to be made.

Under the Mahomedan law each pre-emptor is bound to make his claim the moment he first comes to know of the sale.
[P 122 C 2]

(c) Mahomedan Law—Pre-emption—Right of pre-emption is not inheritable.

The right of pre-emption is a personal right which under the Mahomedan law would not descend to heirs.
[P 122 C 1]

(d) Mahomedan Law—Pre-emption—Doctrine of representation of Hindu law is inapplicable.

The doctrine of representation by a manager peculiar to the Hindu law cannot be given effect to in a pre-emption suit.
[P 122 C 2]

G. K. Parekh—for Appellants.

Weldon and G. S. Mulgaonkar—for Respondents.

Beaman, J.—In this suit the plaintiffs sue to enforce an alleged right of pre-emption in respect of certain property in the town of Borsad Zilla Kaira. All parties to the suit are Hindus. The written statement resting on this fact alleged that there was no local custom authorizing the application of the Mahomedan law of shuffa or pre-emption. Doubtless that passage, if correctly quoted from the written statement by the learned trial Judge, was not very happily worded, as he at least appears to have thought that had he raised an issue, the onus of proof would have lain upon the defendants. I am very clearly of opinion that in litigation between Hindus, where one party alleges the adoption of a whole branch of the Mahomedan law, such as that of pre-emption, and the other party repudiates the application of the foreign law, it lies very heavily on the party alleging to prove that that law has been adopted as a usage and could be proved to have been so adopted by proof of ancient and invariable custom.

In this case the learned trial Judge merely mentioned the point at the conclusion of his judgment, but it is clear that the defendants' pleader must have made use of it in his final address and I am of opinion that the pleader was right when he said that in the state of the pleadings it was the learned trial Judge's duty to have raised the issue of custom upon which alone the plaintiffs could have succeeded in this suit and have thrown the burden of proving it upon them. This was not done because it appears to be generally accepted that the Mahomedan law of pre-emption has been adopted as part of the Customary law and usage of the Hindus of Gujerat generally. This notion, which certainly is widely spread throughout the whole legal profession, appears to me to rest upon no solid foundation whatever. It is traceable in this Court to the case of *Gordhandas Girdhabhai v. Prankor* (1), decided by Gibbs and Melvill, JJ. The facts in that case appear to have been that the trial Court took evidence of the alleged custom and found as a fact that it was not established. But their Lordships in appeal overruled that finding relying apparently upon numerous decisions to the contrary in the Suddar Adawlat of Broach and Surat. That is to say, that the decision rests not upon any proof of custom in the particular case but on the supposed proof of that custom in other cases decided in other Courts. The learned Judges gave as a case in point, (taken, I suppose, from the numerous cases which they believe to have been decided in the Suddar Adawlat of Broach and Surat) the case of *Narun Nursuee v. Premchand Wullubh* (2), decided by Forbes and Newton, JJ. That case came from Surat and the trial Judge, without apparently having taken any evidence whatever of the alleged custom, expressed his opinion that the custom was formally established at any rate in the town of Surat. The appeal Court did not find any such custom proved and taking a short cut to their decision said in effect that if the parties really had been governed by such a custom drawn from the Mahomedan law, the necessary requirements of that law had not been complied with, while if they were not governed by any such

special custom, then they had no right of pre-emption under the Hindu law and so dismissed the claim. Now that is the sole foundation in the case law for this extraordinarily large doctrine, which, as I say, disseminated chiefly by tradition, I think, passing from lip to lip in the profession and confirmed by commentaries and text-books, is that the complete and highly technical Mahomedan law of pre-emption has been adopted not only in the towns of Surat and Broach but by every Hindu inhabitant of Gujerat. It will be observed that even admitting the correctness of the views expressed by the learned Judges in *Gordhandas Girdhabhai v. Prankor* (1), their decision goes no further than the territorial jurisdiction of the Suddar Adawlat of Surat and Broach. We are not in a position to consider any other cases decided in those Adawlat which are merely collectively referred to by the learned Judges, but if the single case they do cite is typical of the rest it supports my view that the foundation of this doctrine is, to say the least, extremely narrow and extremely insecure. Gujarat contains other districts than Surat and Broach and the population of those districts, particularly Kaira and Panchmahals, is of an essentially different character from the population of the towns at any rate of Surat and Broach. Between the decision of 1869, which I have just referred to and the decision of *Rewa Bai v. Dulabhdas* (3), in the year 1902 (Batty and Aston, JJ.), I have been unable to discover a single authority in this Court which supports the view expressed by the learned trial Judge and evidently approved by the learned Judge in appeal. In this case, I think it is very necessary to express my most emphatic disapproval of such methods of extending Customary law. The particular law which is thus sought to be made applicable to the entire population of a Province is a law which the Courts, I think, would only so extend with the very greatest reluctance and on compulsion after being satisfied, in proper cases and upon proper evidence, that that law had been adopted from time immemorial and had been invariably and consistently acted upon from time immemorial to the present day by those Hindus of Guierat

(1) [1869] 6 B. H. C. R. 263.

(2) [1862] 9 Harington 591.

(3) [1902] 4 Bom. L. R. 811.

who are now upon mere assumption said to have incorporated it in their own Hindu law with which it has absolutely no affinity in any point. In all future cases I hope that where a custom of this kind is alleged as the foundation of a claim and is denied by the defendant, the trial Judge will insist upon strict proof of it and will not be misled by the very general dicta to be found in the two cases of *Gordhandas Girāharbhai v. Prankor* (1) and *Bai Rewa v. Dulabhdas* (3), to which I have just referred.

The learned Counsel for the plaintiffs has suggested that if this Court takes that view of the custom, or rather I should say of the manner in which the alleged custom has virtually been presumed to exist in the present case, it would be desirable to frame two issues, namely whether the plaintiffs proved the custom upon which they rely and second whether, if so, the plaintiffs have conformed to all the requirements of the Mahomedan law of pre-emption in the particular case, and remand those two issues to the Court below. I should have been only too willing to do so particularly in order to ascertain whether, upon a proper trial, any evidence whatever would be forthcoming in support of the alleged custom, but I felt that it would be merely wasting the moneys of the plaintiffs in this case for the sake of establishing a general principle, because even assuming that they did succeed in establishing the custom they alleged, it appears to me too clear to admit of argument, that they would still be bound to fail in this litigation. The plaintiffs cannot have it both ways. They must either accept the Hindu law or the Mahomedan law. Under the Hindu law, it is admitted that they have no right of pre-emption whatever. Therefore, they must stand or fall (I am now assuming that their alleged custom is proved) by the strict Mahomedan law of pre-emption and, in my opinion, they must fail. Their father Kishoredas originally brought a suit for pre-emption in respect of this property. He was one at least of the persons entitled to pre-empt; whether the other plaintiffs were entitled to pre-empt or not would depend not so much, I think, upon their relation to each other as members of a joint Hindu family as

upon their being properly classifiable under the Mahomedan law as those entitled to pre-empt. But either they were or were not entitled, and if they were, it is clear that under the Mahomedan law each of them was bound to make his claim the moment he knew of the intended sale to the defendant. It is found by the Courts below—indeed it was admitted before the learned Judge of appeal—that none of the present plaintiffs attempted to enforce his right, whatever that might have been under the Mahomedan law to pre-empt when first the sale to the defendant became known. The only member of the family who did attempt to enforce that right was Kishoredas. During the pendency of Kishoredas' suit, he died. None of the plaintiffs in this suit were made co-plaintiffs with him in that suit. On his death, they applied to be entered as plaintiffs in his stead and so to be allowed to carry on that litigation. Generally speaking, the right of pre-emption is a personal right which, under the Mahomedan law, would not descend to heirs. The Courts, therefore, refused to allow any of the present plaintiffs to continue the suit instituted by Kishoredas and that suit abated. Then on the very last day of the period of limitation allowed to them, the plaintiffs filed this suit in their own right to enforce their own claim to pre-emption. But it is perfectly plain that under the Mahomedan law that claim could not, so advanced, be sustained. They had known for more than a year of the sale to the defendants and not one of them had gone through any of the requisite formalities of the Mahomedan law of pre-emption. In such circumstances, any suit which they brought strictly under Mahomedan law would be clearly pre-destined to failure. They seek to evade this by a blending of the Hindu with the Mahomedan law and the Courts below have acceded to their contentions in this respect. I am, however, very clearly of opinion that the learned Judge of appeal was entirely wrong in thus giving effect in a pre-emption suit to the doctrine of representation by a manager peculiar to the Hindu law. In my opinion, therefore, no useful purpose can be served by remanding the issues suggested by Mr. Weldon for trial upon

evidence by the Court below. I entertain no doubt whatever in my own mind as to what the decision in this case ought to be, and I would, therefore, now dismiss the plaintiffs' suit with all costs upon them.

Macleod, J.—I entirely concur. A custom must be proved by evidence in the first instance and once it is proved, the Courts are entitled to recognize its existence. A custom cannot be proved by the admission of the parties or their counsel before the Court. I concur that the appeal should be allowed with costs throughout.

P.R./R.K.

Appeal allowed.

A. I. R. 1914 Bombay 123 (1)

SCOTT, C. J., AND BATCHELOR, J.

Dagon—Defendant—Appellant.

v.

Sakharam—Plaintiff—Respondent.

Civil Appeal No. 12 of 1912, Decided on 25th February 1914.

Transfer of Property Act (1882), S. 60—Transfer of equity of redemption from mortgagor to mortgagee.

A razinama executed by a mortgagor in favour of his mortgagee relinquishing occupancy rights in the mortgaged land and the complementary kabuliyat given by the mortgagee operate to transfer the equity of redemption from the mortgagor to the mortgagee.

[P 123 C 2]

Judgment.—In this case we have no doubt that the razinama and the kabuliyat (assuming that we cannot look at the document Ex 37, which was contemporaneous with them) operate to transfer the equity of redemption to the mortgage, in whose favour the Court had found that a sum of money was payable by the mortgagor. The case is not distinguishable from *Tarachand Pirchand v. Lakshman Bhanani* (1), and *Vishnu Sakharam Phatak v. Kashinath Bapu Shankar* (2). The words are apt to declare the relinquishment of all the rights of the mortgagor in favour of the mortgagee, and the transaction was such as was contemplated by the terms of the old S. 74, Land Revenue Code. We reverse the order of the lower appellate Court and restore the decree of the original Court with costs throughout upon the plaintiff.

G.P./R.K.

Appeal allowed.

A. I. R. 1914 Bombay 123 (2)

SCOTT, C. J., AND BATCHELOR, J.

Velchand Chhaganlal Shah—Plaintiff.

v.

Lieut. R. C. C. Liston—Defendant.

Civil Appln. No. 271 of 1913, Decided on 26th March 1914, on a letter from Dist. Judge, Ahmedabad.

Civil P. C., (1908), S 151—Abuse of process—Pronote obtained by money-lender from officer—Two documents, one of reference to arbitration and other vakilpatra, authorizing pleader to admit award executed—Application by money-lender to Court for filing award Decree passed by Court in accordance with award—Decree held to be abuse of judicial process.

On 9th July 1913 a money-lender obtained from an officer a promissory note and under date 11th July two other documents, one in the form of a reference to arbitration, whereby the officer and the money-lender agreed to refer the matter of money dealings between them to a pleader and nominated him arbitrator to settle the accounts and pass a judgment against the officer in favour of the money-lender on the strength of the promissory-note and the other document was a vakilpatra by the officer appointing and authorizing a pleader to appear in Court and admit the award that might be passed against him by the arbitrator. On 16th July the money-lender made an application to the Court for filing the award said to have been passed by the arbitrator, and on 22nd July the Court passed a decree in accordance with the award.

Held: that upon the proceedings, it was quite clear that there was no point of difference between the parties and that the Judge had disregarded a circular of the High Court and allowed a most transparent abuse of judicial process.

[P 124 C 1]

Judgment.—In this case the Subordinate Judge, Mr. Mohile, has disregarded a circular of this Court and allowed a most transparent abuse of judicial process. A money-lender obtains from an officer at Aurangabad a promissory-note for Rs 4,931, payable in Ahmedabad or in Baroda, with interest, dated 9th July 1913, and under date 11th July two other documents are obtained from the officer, one in the form of a reference to arbitration whereby the officer and the money-lender agree to refer the matter of money dealings between them to Bnailal Nandlal, a pleader of Ahmedabad, and nominate him arbitrator to settle the accounts and pass a judgment against the officer in favour of the money-lender on the strength of the promissory-note of 9th July. The other document is a vakilpatra by the officer appointing Velchand Umedchand of Ahmedabad as his pleader to authorize

(1) [1875 77] 1 Bom. 91.

(2) [1887] 11 Bom. 174.

him to appear in the Court of the First Class Subordinate Judge of Ahmedabad and admit the award that may be passed against him by Bhailal Nandlal in the matter of money transactions between himself and Velchand Chhaganlal. Both the last-mentioned documents are on printed forms supplied presumably by the money-lender. Then a plaint is filed on 16th July by the money-lender's mukhtyar stating that in order to settle the dispute relating to the promissory note of 9th July the parties appointed the pleader as Panch on the 11th who decided the matter and made his award on the 16th directing that the defendant should pay the plaintiff at Ahmedabad Rs. 4,931 in cash by instalments and Rs. 30 for pleader's fee; and the plaint prayed for a decree in terms of the award. Then there is an affidavit of the agent of the money-lender, dated 21st July, stating that "as the defendant has at present no means to pay off the debt, we appointed a Panch and the Panch fixed instalments as mentioned above."

Mr. Mohile, the Subordinate Judge, on 22nd July, entertained the application to pass a decree in accordance with the so-called award. He says: "There appears to be a real point of difference between the plaintiff and the defendant, that is, the amount due by the latter to the former and the amount of instalments which the defendant should pay to the plaintiff." It was quite clear upon the proceedings that there was no point of difference between the parties and no dispute as to the amount of instalments which should be paid. We regret that the First Class Subordinate Judge should have allowed his Court to be used for a proceeding of this kind, and it reflects but little credit on his judicial capacity that he should have permitted it. We set aside the decree under Ss. 115 and 151, Civil P. C.

G.P./R.K. *Decree set aside.*

A. I. R. 1914 Bombay 124 (1)

HEATON AND SHAH, JJ.

Emperor—Prosecutor.

v.

Govinda Babaji—Accused.

Criminal Ref. No. 42 of 1914, Decided on 13th August 1914, against Additional Sess. Judge, Poona.

Deccan Agriculturists' Relief Act (17 of 1879), S. 2 (4)—Money includes cattle, and

purchaser of bullocks from agriculturist is bound to give receipt under S. 64—Deccan Agriculturists' Relief Act (1879), S. 64.

Money, as defined in S. 2 (4), Deccan Agriculturists' Relief Act includes cattle, and a creditor purchasing bullocks from an agriculturist is bound to give a receipt as required by S. 64 of the Act [P 124 C 1, 2]

*M. R. Bodas—*for Accused.

*S. S. Patkar—*for the Crown.

Judgment.—The Additional Sessions Judge of Poona has referred this case to us. It seems that a creditor was convicted and sentenced under S. 67, Deccan Agriculturists' Relief Act, for not giving a receipt as required by S. 64. The Additional Sessions Judge was under the impression that S. 64 did not apply to the case, because the only payment, in respect of which he found it proved that a receipt was not given, was the delivery of the two bullocks, whereas the section speaks of money. The definition of money, however, in the Act itself says that money shall be deemed to include agricultural produce, implements and stock. Under the head of stock it would necessarily include cattle. The conviction, therefore, so far as the law goes, is perfectly correct. Nor do we see any good reason to induce us to interfere with the conviction in so far as it is based on evidence. But it seems to us that the fine in the circumstances is somewhat excessive and we reduce it to Rs. 15. The difference between the Rs. 15 and Rs. 40, if paid, should be refunded.

G.P./R.K.

Sentence reduced.

A. I. R. 1914 Bombay 124 (2)

BEAMAN AND HAYWARD, JJ.

Venkaji Narayan Kulkarni and others
—Defendants—Appellants.

v.

Gopal Ramchandra Deshpande —
Plaintiff—Respondent.

Second Appeal No. 268 of 1913, Decided on 19th August 1914, from decision of Dist. Judge, Belgaum, in Appeal No. 51 of 1912.

Transfer of Property Act (1882), S. 60—Transfer of equity of redemption from mortgagor to mortgagee.

A razinama executed by a mortgagor in favour of his mortgagee relinquishing occupancy rights in the mortgaged land and a complementary kabuliyat given by the mortgagee operate to transfer the equity of redemption from the mortgagor to the mortgagee.

[P 125 C 1]

Coyajee and G. K. Parekh—for Appellant.

G. S. Rao—for Respondent.

Judgment.—The plaintiff in this suit mortgaged the land to the defendants in 1876, and in 1879 he passed a razi-nama relinquishing all his occupancy-rights in the said land in favour of the defendants. The defendants at the same time gave the complementary kabuliyat. The trial Judge held that this transaction amounted to a 'relinquishment of the equity of redemption by the mortgagor in favour of the mortgagees. The learned Judge of first appeal has held that it did not. In his opinion the only effect of the razinama and kabuliyat under the Act of 1865 was to confer upon the mortgagees the privilege, as the learned Judge calls it, of paying the Government assessment. We find it a little difficult to understand in what light this could have appeared to the learned Judge a privilege for which any person would be anxious to pay good consideration. However that may be, on the facts found by the learned Judge of first appeal, the case is clearly covered by authority. The judgment of this appeal Court in *Dagon v. Sakharam* (1), following *Vishnu Sakharam Phatak v. Kashinath Bapu Shankar* (2) and *Tarachand Pirchand v. Lakshman Bhawani* (3), appears to us to have settled the law beyond controversy upon the only question we are asked to answer. In our opinion the razinama and the kabuliyat of the year 1879 effectually extinguish the plaintiff's equity of redemption. We must, therefore, now reverse the decree of the lower appellate Court and restore that of the Subordinate Judge with all costs upon the respondent throughout.

G.P./R.K.

Appeal allowed.

(1) A. I. R. 1914 Bom. 123 (1).

(2) [1887] 11 Bom. 174.

(3) [1875-77] 1 Bom. 91.

A. I. R. 1914 Bombay 125

SCOTT, C. J., AND HAYWARD, J.

Bhawanishankar Bhaishankar Vyas—Plaintiff—Appellant.

v.

Talukdari Settlement Officer—Defendant—Respondent.

Second Appeal No. 84 of 1913, Decided on 7th September 1914, from decision of Dist. Judge, Ahmedabad.

Civil P. C. (1908), S. 80 — Talukdari Settlement Officer serving notice of eviction on person in wrongful possession of land—Latter cannot sue for permanent injunction to restrain former from evicting him without notice under S. 80—Bombay Land Revenue Code (5 of 1879), Ss. 79-A and 202—Bombay Gujarat Talukdars Act (1888), Ss. 29-B and 33 (2) (cc).

If, under the provisions of the Bombay Land Revenue Code, a Talukdari Settlement Officer serves a notice of eviction on a person whom he considers to be wrongfully in possession of any land, that person cannot, without giving a notice under S. 80, Civil P. C., sue for a permanent injunction to restrain the Settlement Officer from evicting him from the land.

[P 126 C 1]

D. A. Khare—for Appellant.

N. K. Mehta—for Respondent.

Judgment.—We do not think it necessary in this case to call upon the learned pleader who appears for the Talukdari Settlement Officer in support of the judgment of the lower appellate Court, for although, as at present advised, we think that the notification purporting to have been issued under S. 29-B, Gujarat Talukdars Act, was not a sufficient reference to the Talukdar debtor and his property to extinguish the claim of the plaintiff if the claim was not submitted under that section, the plaintiff's suit must fail because he has not given notice as required under S. 80, Civil P. C. The cause of action in the present case is the process initiated by the Talukdari Settlement Officer to enforce the eviction of the plaintiff from the property in question. S. 79-A, Land Revenue Code, provides that any person unauthorizedly occupying, or wrongly in possession of, any land, which he uses or occupies in contravention of any of the provisions of the Gujarat Talukdars Act of 1888, may be evicted summarily by the Collector. Then S. 202 of the same Code provides that "whenever it is provided by this or by any other Act...that the Collector may or shall evict any person wrongfully in possession of land, such eviction shall be made in the following manner: by serving a notice on the person or persons in possession, requiring them...to vacate, and if such notice is not obeyed, by removing...any person who may refuse to vacate." Therefore the service of the notice which has led to this suit is the first act in the process of eviction provided by S. 202, Land Revenue Code, and the suit being to

restrain the accomplishment of the act of eviction is a suit against a public officer in respect of an act purporting to be done by him in his official capacity, and therefore S. 80, Civil P. C., requires as a condition precedent to the institution of the suit a notice which has not been given. The suit must therefore be dismissed. Each party should bear his own costs throughout.

G.P./R.K.

Suit dismissed.

A. I. R. 1914 Bombay 126

BACHELOR AND SHAH, JJ.

Moro Balwant Marathe — Accused — Applicant.

v.

Emperor — Opposite Party.

Criminal Revn. No. 166 of 1913, Decided on 13th July 1913, from order of Sess. Judge, Belgaum, in Appeal No. 7 of 1913.

Penal Code, Ss. 352 and 504 — In pleader's room presence of A, who was not pleader, was objected to under existing rule by B, a pleader—A refused to leave—B thereupon put him out — But A again returned whereupon B first abused him and then apologized—B was convicted under Ss. 352 and 504 — Pleader's room held to be private room and no offence under S 352 was committed by B—And as regards charge under S 504, B was under protection of Penal Code, S. 95.

A, who was not a pleader, entered the pleaders' room attached to a District Court in order to see a pleader. B, a pleader, objected to his presence and caused his attention to be directed to a rule to the effect that the room was reserved for pleaders, and that if an outsider entered the room and his presence was objected to, it was incumbent upon such person to withdraw. A refused to leave the room. B thereupon put him out of the room. Afterwards A again returned to the room and on this occasion B abused him, but very shortly after he apologized. On these facts, B was convicted of offence under Ss. 352 and 504, Penal Code.

Held : (1) that the pleader's room was a private room and A was not entitled to persist in remaining there after his presence had been objected to ;

(2) that the intention of A in persisting in the room was to annoy B,

(3) that B did not exceed his rights in putting A out of the room, and therefore no offence under S 352 was committed ;

(4) that, as regards the charge under S. 504, B was within the protection allowed by S. 95, Penal Code, having regard to the circumstances of provocation in which the abusive words were uttered and to the frank and sincere apology which immediately followed their use.

[P 126 C 2 ; P 127 C 1]

S. R. Bakhale—for Applicant.

A. G. Desai—for the Crown.

Judgment.—This is an application in our revisionary jurisdiction and is made by one Moro Balwant Marathe who is a pleader of the District Court of Belgaum. He has been convicted of assault otherwise than on grave provocation under S. 352 and of intentional insult with intent to provoke a breach of peace under S. 504, I. P. C. He has been sentenced to a total fine of Rs. 16.

It appears that the complainant, who is not a pleader, intruded into the pleaders' room at Belgaum in order to see the Hon'ble Mr. Belvi, who is a pleader in that District. The applicant objected to the complainant's presence, and in his presence the rule was read out to the effect that the room was reserved for pleaders, and that if any person, not a pleader, entered the room and his presence was objected to, it was incumbent upon such person to withdraw. The complainant however paid no attention to the hint thus conveyed to him, and the applicant then formally notified to him his objection to his presence in the room reserved for pleaders. The complainant however instead of having the grace to withdraw from the room where he had no right to be and where his presence was objected to, refused to leave the room and sat resolutely down. Then the applicant went to him and put him out of the room. Afterwards the complainant again returned to the pleader's room, and on that occasion the applicant used to him abusive language, for which he has been convicted under S. 504. Very shortly after this somewhat trifling but unfortunate occurrence the applicant sent to the complainant an apology in which, alluding to the incident which "had just occurred," he says : "I feel great regret and apologize to you for that incident. In consequence of certain circumstances to which I need not refer I lost my temper which I ought not to have lost. Whatever it may be I feel very sorry for what occurred and I beg to be excused. Let the matter end there with common understanding."

Three days afterwards however the complainant elected to file this complaint. We agree with the learned Sessions Judge in thinking that the pleaders' room in the District Court of Bel-

gaum was, for our present purposes, a private room and that the complainant was not entitled to persist in remaining there after his presence had been objected to. That he did so persist is, in our opinion, clear evidence that his intention was to annoy the applicant. There is no evidence upon which we can believe that any unnecessary violence, or indeed any real violence at all, was used by the applicant towards the complainant, and in these circumstances we do not find that the applicant exceeded his rights in putting this trespasser out of the pleaders' room. The charge therefore under S. 352 cannot be sustained.

As regards the charge under S. 504 Mr. Bakhale has with some vehemence urged upon us the contention that the actual words of abuse (Halkar Banchod) whatever may be their etymological signification, are yet used amongst the people in common in everyday life without any particular meaning or sting. While we do not deny that there may be some force in this argument, we wish to express our unqualified disapproval of the use of such words as those proved here to have been used by a pleader in the District Court premises. At the same time, when we pay attention to the circumstances of provocation in which those words were uttered, to the frank and sincere apology which immediately followed their use, we come to the conclusion that the use of them may, without undue straining, be brought within the protection allowed by S. 95, I. P. C., to acts which, though likely to cause harm, are likely to cause only such slight harm that no person of ordinary sense and temper would complain of them.

We think therefore that the conviction under S. 504 is also unsustainable.

For these reasons we make the rule absolute, reverse the convictions and sentences and direct that the fine, if paid, be refunded.

V.S./R.K.

Rule made absolute.

A. I. R. 1914 Bombay 127

SCOTT, C. J., AND BEAMAN, J.

Lachiram Dayduram Marwari —
Plaintiff—Appellant.

v.

Jana Yesu Mang and another —
Defendants—Respondents.

Second Appeal No. 563 of 1913, Decided on 30th July 1914, from decision of Dist. Judge, Ahmednagar.

Civil P. C., (1908, O. 23, R. 3)—Consent decree cannot be modified in execution on ground not recognized in decree itself.

A consent decree can only be varied by consent. Therefore no modification of a consent decree can be allowed in execution on grounds not recognized in the decree itself as giving a right of such modification. [P 127 O 2]

A. G. Desai—for Appellant.

D. C. Virkar—for Respondents.

Judgment.—In this case we think that the learned Judge was wrong in not enforcing the decree according to its terms. The decree is quite explicit. The first instalment is to be paid on or before 1st March 1908. Thereafter the defendant is to go on paying to the plaintiff an instalment every year. If the defendant fail to pay any two instalments at the proper time the plaintiff is to take the property into his possession by right of ownership. The learned Judge of the lower appellate Court has held that the first two instalments were paid too late, but were accepted, and that subsequent two instalments have not been paid in time. There has been therefore a default with regard to the last two instalments which entitled the plaintiff to take possession of the property. The case is very similar to *Bapu v. Vithal* (1), which we recently decided, following the decision of North, J., in *Australasian Automatic Weighing Machine Co. v. Walter* (2), where it was held that a consent decree can only be varied by consent. There is no consent here, and as pointed out by this Court in *Saguna v. Sadashiv* (3) it is obvious that no modification of a decree can be allowed in execution upon grounds not recognized in the decree itself as giving a right of such modification. The decisions cited by the learned District Judge, *Krishna-bai v. Hari Gwind* (4) and *Balanbhat*

(1) [1915] 27 I. C. 184.

(2) [1891] A. W. N. 170.

(3) [1902] 26 Bom. 710=4 Bom. L. R. 527.

(4) [1907] 31 Bom. 15=3 Bom. L. R. 818.

v. *Vinayak Ganpatrav* (5), are inapplicable where the relation of landlord and tenant is not created by the decree. We therefore set aside the decree of the lower appellate Court and remand the case in order that the decree may be executed according to its terms. The respondents must pay the costs throughout.

G.P./R.K.

Decree set aside.

(5) [1911] 10 I. C. 746=35 Bom. 239.

A. I. R. 1914 Bombay 128 (1)

HEATON AND SHAH, JJ.

Emperor

v.

Ganpat Sitaram—Complainant.

Criminal Appeal No. 511 of 1913, Decided on 7th January 1914, from judgment of Ch. Presy. Mag., Bombay.

Penal Code (45 of 1860), S. 486—General get-up of tooth powder labels almost identical—Offence under S. 486 held to be committed.

Where the general get-up of the labels of tooth powder tins of two different manufactures was almost identical:

Held: that an offence under S. 486, Penal Code, had been committed.

Held further: that for the purposes of the case false trade-mark and counterfeit trade-mark were the same thing. [P 128 C 1]

V. J. Patel and Ratanlal Ranchoddas—for the Crown.

Weldcn—for Complainant.

Judgment.—We assume for the purposes of this judgment that the sentence is an appealable sentence, but we do not decide the point. It is immaterial, because we consider the conviction is correct.

There is no doubt in our minds that the accused, the present appellant, has in fact used a false trade-mark. We gather this from the conclusion of the Magistrate taken together with the evidence of our own senses when we look at the boxes of tooth powder, one of which is said to resemble the other. That being so, I think there is no substance in any of the defences. It is urged that the conviction is for counterfeiting and that a counterfeit trade-mark is not at all the same thing as a false trade-mark which is defined in S. 480. It seems to us however that for the purposes of this case false trade-mark and counterfeit trade-mark are the same thing. Then it was urged that the case fell under Cl. (a) or (b) or (c) of S. 486. I do not think this is

so. The Magistrate decided that this deception was not innocent and that reasonable precautions had not been taken. I think he was right in so deciding.

Therefore the appeal must be dismissed and the sentence confirmed.

We decide to allow Rs. 50 as costs in the appeal.

G.P./R.K.

*Appeal dismissed.***A. I. R. 1914 Bombay 128 (2)**

SCOTT, C.J. AND DAVAR, J.

Fazulbhoy Jaffar—Plaintiff—Appellant.

v.

Credit Bank of India Ltd.—Defendant—Respondent.

Original Civil Appeal No. 8 of 1914, Decided on 18th August 1914.

(a) Companies Act (1882), S. 45—Shareholder, minor at allotment of shares, receiving dividends after majority and raising no objection to inclusion of his name in register of members—He is estopped from denying that he is share-holder.

A share-holder of a limited company, who was a minor at the date of allotment of shares to him, but after attaining majority, received dividends and raised no objection to his name being included in the register of members is estopped by his conduct, while a person sui juris from denying as between himself and the company's representative that he is a share-holder. [P 129 C 2]

(b) Companies Act (1882), S. 45—Minor can be member of the company.

A minor may be a member of a company under the Companies Act. [P 129 C 2]

(c) Companies Act (1882), S. 151—Rights and liabilities of registered share-holder stated.

A registered holder of shares in a statutory company is a person with a vested interest in property which may be burdened with an obligation to pay calls in the future. The registered member cannot keep the interest and prevent the company from having it and dealing with it as their own without being bound to bear the burden attached to it. [P 129 C 2]

Kanga—for Appellant.

Facts.—This is an application by a share-holder to be struck off the list of contributories on the ground that he was an infant at the time he applied for the shares, and that therefore, his contract with the company was void. The applicant may be considered to be in the same position as a share-holder whose name has been put upon the register, either without his consent or without any application on his part. As soon as

he becomes aware of the fact he may refuse to accept the ownership of the shares within a reasonable time, but if he allows his name to remain on the register without doing anything he must be taken to have acquiesced. In *Constantinople and Alexandria Hotels Co., In re; Ebbetts, Ex parte* (1), a minor made a similar application, and Giffard, L. J., remarked: "I do not rely on the transfer which he executed, but on the ground that he acquiesced for a lengthened period in being on the register."

Again in *Yeoland Consols, In re* (2), the applicant was put upon the register when a minor without any application on his part. On an application to remove his name from the list of contributories on the winding up, Stirling, J., said: "Being on the register of the company for the shares he is prima facie entitled to them. Shares are property which may turn out to be valuable, and may on the other hand turn out to carry with them only a very serious liability. The law assumes that where property is assigned to a person the assignee accepts it, but he may refuse to accept it if he does so within a reasonable time." The present applicant knew he was on the register for the shares. From his coming of age in July or August 1912 till the winding up order was made in November 1913, he must be taken to have known that his name was on the register and since he chose to allow his name to remain there without doing anything, it cannot now be removed."

Judgment.—The appellant appeals from an order of the Chamber Judge including him in the list of contributories of the Credit Bank of India, a limited company now being wound up by the Court. The appellant applied for 50 shares in this company, which were allotted to him on 8th January 1910 on payment of Rs. 10 per share, the nominal value being Rs. 50. If he has been rightly included among the contributories, he will be liable for Rs. 40 per share. He contests his liability on the ground that he was a minor at the date of the allotment. It is not disputed that he attained majority in August 1912. He has received dividends at the

rate of 6 per cent per annum on the sums paid upon his shares twice in each of the years 1911, 1912 and 1913, and he has raised no objection to his name being included in the register of members until January 1914. Under these circumstances it cannot be doubted that he has intentionally permitted the company to believe him to be a share-holder and in that belief to pay him dividends on his shares since he attained majority. He is, therefore, estopped now by his conduct while a person sui juris from denying as between himself and the company's representative that he is a share-holder.

This is sufficient to dispose of the appeal; but we will express our opinion upon the point made in the excellent argument of Mr. Kanga. His contention was that the matter must be decided according to the law contained in the Contract Act under which a minor is not competent to contract and, therefore, it cannot be said that he has agreed with the company to become a member, which is one of the conditions of membership under the Companies Act, 1882, S. 45. This argument would be more convincing if the words used in S. 45 were "has contracted with the company," for under the Contract Act it is not every agreement that is a contract. Moreover, it appears from the statutory Art. 45 in Table A of the Companies Act that a minor may be a member of a company under that Act.

It has been settled law in England for many years that a registered holder of shares in a statutory company is a person with a vested interest in property which may be burdened with an obligation to pay calls in the future. The registered members cannot keep the interest and prevent the company from having it and dealing with it as their own without being bound to bear the burthen attained to it"; *London & N.W. Ry. Co. v. M. Michael* (3).

This view of the position of a shareholder pleading minority when registered was taken by Stirling, J., in *Yeoland Consols, In re* (2) and the learned Chamber Judge has, we think, rightly adopted it in the present case. The same principle underlies S. 248, Contract Act.

(1) [1870] 5 Ch. App. 302=39 L. J. Ch. 679=22 L. T. 424=18 W. R. 394.

(2) [1888] 58 L. T. 922=1 Meg. 39.

(3) [1851] 20 L. J. Ex. 233=6 Ex. 273=6 Railw. Cas. 495.

Qui sentit commodum, sentire debet et onus.

G.P./R.K.

Appeal dismissed.

A. I. R. 1914 Bombay 130

SCOTT, C. J., AND BATCHELOR, J.

Kashinath Ramchandra — Plaintiff—Appellant.

v.

Nathoo Keshav—Defendant—Respondent.

Second Appeal No. 536 of 1913, Decided on 24th February 1914, from decision of 1st Cl. Sub-Judge, Dhulia, in Appeal No. 399 of 1911.

(a) Civil P. C. (1908), O. 2, Rr. 2 and 4—Cause of action for various claims in one suit does not depend upon character of relief prayed for.

The cause of action upon which the plaintiff may have various claims in one suit under O. 2, R. 2, does not depend upon the character of the relief for which he prays. It refers to the media upon which the plaintiff asks the Court to arrive at a conclusion in his favour.

[P 130 C 2]

(b) Civil P. C. (1908), O. 2, R. 4 (c)—Suit for recovery of immovable property must not necessarily be based on different cause of action to suit for arrears of rent.

The words of O. 2, R. 4 (c) do not imply that in all cases a suit for the recovery of immovable property must necessarily be based upon a different cause of action to a suit for arrears of rent for the same land.

[P 131 C 1]

(c) Civil P. C. (1908), O. 2, R. 2,—Stipulation in lease entitling lessor to recover possession on lessee's failure to pay rent—Failure to pay rent by lessee—Suit for recovery of possession only brought and decreed—Subsequent suit to recover arrears of rent is barred by O. 2, R. 2.

A lease for ten years provided that if the lessee failed to pay rent of any year, the lessor would be entitled to recover possession of the land. The lessee failed to pay rent for two years. A suit for recovery of possession was filed under the forfeiture clause. The plaintiff stated in the plaint that he would bring a separate suit for rent, but he did not obtain permission of the Court in that respect. A decree for possession was passed and possession obtained. Subsequently the plaintiff sued to recover the arrears of two years rent from the defendants.

Held: that the suit was barred under O. 2, R. 2, Civil P. C.

[P 130 C 2]

P. B. Shingne—for Appellant.

N. M. Samarth—for Respondent.

Judgment.—The material facts are stated by the appellate Judge as follows: "The lease provided that on the defendant's failure to pay the rent the plaintiff should be entitled to take possession of the lands. Defendant having failed to pay the rent of the two

years in question the plaintiff sued them in 1909 for possession and obtained a decree which directed that on the defendant's default to pay all the arrears of rent and costs within three months the plaintiff should take possession of the lands and recover his costs from them: see Ex. 19. It is admitted that the defendant did not pay the rent and costs and that consequently the plaintiff took possession of the lands. In the said suit the plaintiff asked for permission to bring a separate suit for the rent of the two years in question, but none was given to him. The question, therefore, is whether the present suit is barred O. 2, R. 2, Civil P. C. I think it is clearly barred."

In our opinion the decision of the lower Court is correct. The claim in the present suit for rent up to the date of the forfeiture arises upon the same contract of tenancy as did the landlord's right of forfeiture for non-payment of rent.

The cause of action upon which the plaintiff may base various claims in one suit under O. 2, R. 2, does not depend upon the character of the relief for which he prays. "It refers to the media upon which the plaintiff asks the Court to arrive at a conclusion in his favour" *Musammatt Chand Kour v. Partab Singh* (1) "to every fact which it would be necessary for the plaintiffs to prove in order to support his right to the judgment of the Court." *Read v. Brown* (2). If the evidence required to support two claims is different in any material respect the causes of action are different: see *Brunsdon v. Humphrey* (3). The rule of the Supreme Court in England (adopted in O. 2, Civil P. C.) which prohibits with certain exceptions the union in one suit of other claims with a claim for the recovery of immovable property is, as pointed out by Sir George Jessel, in *Gledhill v. Hunter* (4), a survival from the rule prevailing in ejectment actions modified by a limited application of the rule in Chancery that you might join in a suit to establish

(1) [1889] 15 I. A. 156=16 Cal. 98=5 Sar. 243.

(2) [1889] 22 Q. B. D. 128=58 L. J. Q. B. 120=60 L. T. 250=37 W. R. 138.

(3) [1884] 14 Q. B. D. 141=53 L. J. Q. B. 476=51 L. T. 529=32 W. R. 944=49 J. P. 4.

(4) [1880] 14 Ch. D. 492=49 L. J. Ch. 333=42 L. T. 392=28 W. R. 530.

title to land any other cause of action so long as you did not make your bill open to objection on the ground of multifariousness. Up to the time of the Judicature Act, 1873, the Common law Courts entertained actions for rent upon the covenant in the lease after ejectment on the ground of forfeiture for non-payment of rent: see *Hartshorne v. Watson* (5); but no necessity or reason exists for a separate suit for rent where there has been a forfeiture for non-payment under the practice established by the Judicature Acts and the Civil Procedure Code. Both the claim for possession and the claim for rent may be enforced in one suit without any inconsistency. And since they may be enforced they ought to be enforced in one suit provided the cause of action is the same, unless the Court gives leave for the reservation of one of the remedies.

We agree with the criticism expressed by the Allahabad High Court in *Mewa Kuar v. Banarsi Prasad* (6) that the wording of Ss. 43 and 44 (now O. 2, Rr. 2 and 4) "is not happy and suggests confusion," which confusion does not appear to us to be diminished by the addition of Cl. (c) in R. 4. We do not however think that the words of R. 4 imply that in all cases a suit for the recovery of immovable property must necessarily be based upon a different cause of action to a suit for arrears of rent for the same land. There may be cases in which a suit for recovery of land will involve the production of different evidence to that necessary to support a suit for rent in respect of the same land: for example a suit for rent up to the date of a forfeiture for breach of covenant to repair would depend upon different evidence to that necessary to establish the breach of covenant and consequent right to possession. That however is not the case here.

The plaintiff apparently recognized that his claim for rent and claim for possession arose out of one and the same cause of action, but though in his plaint in the earlier suit he stated that he reserved his right to claim rent, he omitted to obtain the assent of the Court to the reservation. He is therefore barred

by the express provisions of O. 2, R. 2, from now suing for the relief so omitted. We affirm the decree of the lower Court and dismiss the appeal with costs.

G.P./R.K.

*Decree affirmed.***A. I. R. 1914 Bombay 131**

HEATON AND SHAH, JJ.

Chatru Abaji Patil—Defendant—Appellant.

v.

Kondaji Vithal Patil—Plaintiff—Respondent.

Second Appeal No. 833 of 1912, Decided on 9th September 1913, from decision of Addl. First Class Sub-Judge, Nasik, in Appeal No. 509 of 1911.

(a) Civil P. C. (14 of 1882), S. 257-A—Agreement to pay interest on decretal debt without Court's sanction is void.

An agreement to pay interest on a decretal debt made without the sanction of the Court, is void under para. 2, S. 257-A, Civil P. C., (1882). [P 132 C 1]

(b) Deccan Agriculturists' Relief Act (17 of 1879), S. 13 (b)—Agreement to pay money not in excess of decretal amount—Stipulation to pay interest only on default—Main agreement is not void though agreement to pay interest is void.

Where the primary and main agreement is to pay a sum of money which is not in excess of the decretal amount, and it is only on failure to fulfil this agreement that any interest is to be charged, the provision to pay interest is not a part of the agreement for the satisfaction of the decretal debt. Therefore, although the agreement to pay interest is void, the primary and main agreement is not void. [P 132 C 1]

V. S. Bhandarkar and A. G. Desai—for Appellant.

Dhirajlal K. Thakore and K. H. Kelkar—for Respondent.

Heaton, J.—This is a case under the Deccan Agriculturists' Relief Act and it involves the construction of the terms of S. 257-A of the old Civil Procedure Code. The mortgage-bond, with which we are concerned, as found by the Court below, is for the payment of Rs. 900. Of this Rs. 889-12-0 was on account of a decretal debt and Rs. 10-4-0 was for fresh consideration, and the agreement was not made with the sanction of the Court. Therefore, if it offends against the provisions of S. 257-A, it is void.

Both the lower Courts have found this agreement is not void. The words of the agreement itself are these: "Altogether Rs. 900, as mentioned above, I shall pay off all the money at the stated period in nine years from the aforesaid

(5) [1838] 4 Bing. (N. O.) 178=5 Scott 506=6 D. P. C. 404=7 L. J. C. P. 138=2 Jur. 155=1 Arn. 15=44 R. R. 698=132 E. R. 756.

(6) [1895] 17 All. 533=(1895) A.W.N. 121.

date. The instalments shall be paid every year by me. In case of default in payment of the instalments I shall pay interest at the rate of $1\frac{1}{2}$ per cent a month."

The decree made no provision as to payment of interest, and therefore, if the mortgage-bond is in fact an agreement to pay the decretal debt with interest, it does offend against the provisions of S. 257-A. Had there been no authorities bearing on the meaning of S. 257-A, I should be disposed to go contrary to the views expressed by the lower Courts here; but there is an authority and that is the case of *Bhagchand v. Radhakisan Mohanlal* (1), as explained in the case of *Govind v. Sakharam* (2). That authority, although as I say, I might, if the matter were open, decide differently, is absolutely intelligible and appears to me to be based on this principle. In that case, as in this, the primary and main agreement was to pay a sum of money which was not in excess of the decretal amount, and it was only on failure to fulfil this agreement that any interest would be charged i. e., the provision to pay interest is not a part of the agreement for the satisfaction of the decretal debt; it is only something which comes into operation when there is a breach of that agreement. Therefore the primary and main agreement is not void. I can find nothing in this application of the law which conflicts with the Full Bench decision *Heera Nema v. Pestonji Dassabhoy* (3) or in the case to which I myself was a party, that is, *Bhagabhoy v. Narayan Gopal* (4). It may be that the reasoning adopted is rather fine and makes distinctions which a more robust or plain reading of the section would ignore, but these distinctions have been made in the past, and it appears to me to be better to follow them at least to the extent of the reasoning which leads to the result arrived at in the case of *Bhagchand v. Radhakisan* (1), especially, as to do so, it seems to me, does not work any injustice and does not militate against what after all is the main purpose of S. 257-A.

For these reasons, though I confess

(1) [1904] 28 Bom. 62.

(2) [1904] 28 Bom. 383=6 Bom. L. R. 344.

(3) [1898] 22 Bom. 693.

(4) [1907] 31 Bom. 552=9 Bom. L. R. 950.

not without hesitation, I would confirm the decree of the lower Court and dismiss the appeal with costs.

Shah, J.—I concur. Having regard to the terms of the bond in this case, I am of opinion that the present case is governed by the ruling of *Bhagchand v. Radhakisan* (1). After considering the cases cited at the Bar, I have come to the conclusion that there is no conflict between the ruling which I have referred to and the case of *Heera Nema v. Pestonji Dassabhoy* (3) and *Bhagabai v. Narayan* (4). The ratio decidendi in *Bhagchand's* case (1), as explained by the learned Judge who decided that case, in the subsequent case of *Govind v. Sakharam* (2) is quite clear; and I am not able to see anything in the words of S. 257-A or in any of the cases cited to us which can justify the argument that the ruling tends to defeat the object of S. 257-A.

G.P./R.K.

Appeal dismissed.

A. I. R. 1914 Bombay 132

SCOTT, C. J., AND HAYWARD, J.

Satvaji Balajirao Deshmukh—Plaintiff—Appellant.

v.

Sakharlal Atmaram Shet and others—Defendants—Respondents.

Second Appeal No. 169 of 1914, Decided on 8th September 1914, from decision of Addl. Assistant Judge, Thana in Appeal No. 20 of 1913.

Decree — Execution — Decree awarding possession of property on payment of money within certain time—Amount paid within that period calculated from date of confirmation of decree on appeal—Right to recover possession is not forfeited.

Where the decree of a Court directs a party, as a condition precedent to his recovering possession of certain property, to pay to another party within a prescribed period a certain sum of money, and also provides that if the former fails to pay as directed within the prescribed period, he shall forfeit his right to recover possession of the property and the party so directed pays the requisite amount within the same period, not from the decree of that Court but from the decree of the appellate Court, which confirms the decree of the lower Court on that party's appeal, he does not forfeit his right to recover possession of the property.

[P 134 C 1]

P. D. Bhide—for Appellant.

T. R. Desai—for Respondents.

Judgment.—The suit in relation to which the execution proceeding now in question have been taken was brought by the plaintiff against the first six de-

defendants as vendors, who denied his title as purchaser, and against defendant 7, as mortgagee from the other defendants,, to enforce his purchase against the vendors and to redeem the mortgage.

The original Court dismissed the suit, holding that the plaintiff's title as purchaser was not established as he had not paid the full purchase-money and was not ready and willing to perform his contract. The first appeal Court however reversed the decree of the original Court and passed a decree that on the plaintiff paying defendants 1 to 6 the sum of Rs. 203-1-8 and paying all costs in the suit within six months from the date of the decree, he should be put in possession of the property and should then pay defendant 7 the sum of Rs. 997-8 found due on the mortgage with further interest from the date of recovering possession to date of payment on Rs. 633, by annual instalments of Rs. 150, payable in February of each year beginning with February 1912, and that if the plaintiff failed to pay the sum due to defendants 1 to 6 and costs within six months from the date of the decree, he should forfeit his right to recover possession of the land.

None of the parties were satisfied by this decree. The plaintiff within ninety days filed an appeal to the High Court and the two sets of defendants filed separate sets of cross-objections. The decree was however confirmed by the High Court and the and cross-objections were dismissed.

Within six months from the date of the High Court decree the plaintiff deposited in Court the amount payable by him. Defendant 7 then put in an objection that the plaintiff not having complied with the terms of the decree of the first appellate Court, his right to recover possession in execution was forfeited.

Both the lower Courts have upheld this objection on the authority of *Ramaswamy Kone v. Sundara Kone* (1). There is however the direct authority of this Court to the contrary: see *Nanchand v. Vithu* (2). It was there said: "Both parties must be held equally bound or equally benefited by the result

of this second appeal, and if the original respondents would have become entitled to execute the decree of the High Court in case it had reversed the decision of the lower Courts, we do not see any reason which prevents the present appellant from claiming his right to execute the decree of the High Court in his favour." These observations, which were based upon a similar state of facts, are applicable to the present case and the lower Courts should have followed that decision. It was in accordance with a decision reported in *Sakhalchand Rikhawdas v. Velchand Gujar* (3).

The decision of the Madras High Court followed by the lower Courts refers to the judgment of Sir John Edge in *Jaggar Nath Pande v. Jokhu Tewari* (4), which was based upon the express provisions of S. 214, Civil P. C., applicable in decrees in pre-emption suits, but we do not understand that judgment as throwing any doubt on the Full Bench decision in *Muhammad Sulaiman Khan v. Muhammad Yar Khan* (5), delivered by the same learned Chief Justice and applied in *Sakhalchand Rikhawdas v. Velchand Gujar* (3) and *Nanchand v. Vithu* (2), or the Full Bench decision of the Allahabad High Court, *Shohrat Singh v. Bridgman* (6), explained and adopted in *Muhammad Sulaiman Khan v. Muhammad Yar Khan* (5). The observations of Banerji, J., in *Bhola Nath Bhattacharjee v. Kanti Chandra Bhattacharjee* (7), referred to in *Ramaswamy Kone v. Sundara Kone* (1) and relied on by the respondent's pleader before us, were in a case where the decree of the lower Court had been dismissed and not confirmed; and Banerji, J., may have had in mind the possible distinction between dismissal and confirmation indicated by Jenkins, C. J., in *Kailash Chandra Basi v. Girija Sundari Debi* (8). Of the other cases cited for the respondent, *Patloji v. Ganu* (9) was a case where there was no decision on final appeal but only a dismissal for non-prosecution in the final appeal and similar therefore to the deci-

(3) [1894] 18 Bom. 203=(1893) P. J. 79.

(4) [1896] 18 All. 223=(1896) A. W. N. 43.

(5) [1889] 11 All. 267=(1889) A. W. N. 55.

(6) [1882] 4 All. 376=(1882) A. W. N. 68.

(7) [1898] 25 Cal. 311=1 C. W. N. 676.

(8) [1912] 14 I. C. 299=39 Cal. 925.

(9) [1891] 15 Bom. 370=(1890) P. J. 336.

(1) [1908] 31 Mad. 28=17 M. L. J. 495=3 M. L. T. 26.

(2) [1895] 19 Bom. 258.

sion of the Judicial Committee in *Chaudhari Abdul Majid v. Jawahir Lal* (10), in which it was held that the time for executing a decree nisi for sale of mortgaged property ran from the date of the High Court decree confirming the decree of the first Court. *Aminabi v. Sidu* (11) was a case where the decree had been legally executed before the appeal and the defendant never applied for a stay of execution or tendered the money payable by him till after the dismissal of the appeal. We also think that the decision in *Raja Bhup Indar Bahadur Singh v. Bijai Bahadur Singh* (12) is an authority in the appellant's favour. What has to be looked at and interpreted is the decree of the final appellate Court, in this case the High Court.

We reverse the decree of the lower Court, set aside the defendant's objection and remand the plaintiff's application in execution for disposal according to law.

Defendant 7 to pay the costs of the objection throughout.

G.P./R.K.

Decree reversed.

(10) [1915] 23 I. C. 649=36 All. 350=16 Bom. L. R. 395=16 M. L. T. 44=18 C. W. N. 963=19 C. L. J. 626=27 M. L. J. 17= (1914) M. W. N. 485=1 L. W. 483 (P. C.).

(11) [1892] 17 Bom. 547.

(12) [1900] 23 All. 152=27 I. A. 209=2 Bom. L. R. 978 (P. C.).

A. I. R. 1914 Bombay 134

HEATON AND SHAH, JJ.

Hari Annaji Deshpande—Appellant.

v.

Vasudev Janardhan Satbhai — Respondents.

Second Appeals Nos. 705 and 706 of 1912, Decided on 24th February 1914, from decision of Dist. Judge, Ahmednagar, in Appeals Nos. 32 and 31 of 1911.

(a) **Hindu Law—Succession—Mitakshara—Sister comes after grandmother and half-brother's son.**

According to the Mitakshara, as understood in the Bombay Presidency, the sister comes next after the grandmother and a fortiori after the half-brother's son in the order of succession: 32 Bom. 300, *Foll.* [P 135 C 2]

(b) **Civil P. C. (1908), S. 11—Co-defendants—Essentials for matter to become res judicata between co-defendants stated.**

In order that any decision between co-defendants might operate as res judicata in any subsequent suit between them it is necessary to establish that there was a conflict of interest among the defendants and that there was a

judgment defining the real rights and obligations of the defendants inter se: 11 Bom. 216, *Ref.* [P 135 C 2; P 136 C 1]

K. H. Kelkar—for Appellant.

D. R. Patwardhan—for Respondents.

Shah, J.—Two points of law have been urged in these second appeals, firstly, that a full sister is a nearer heir than a son of a separated half-brother according to Hindu law, and secondly, that the question of heirship is res judicata in favour of the sisters.

As regards the first point, the competition is between the full sisters of the deceased Bhagwan and the son of his separated half-brother. The parties are admittedly governed by the Mitakshara and not by the Mayukha. The sister has been recognized as an heir under the Mitakshara by this Court in several cases, and it is beyond dispute that she is an heir under the Mayukha. The dispute really is about the position to be given to her in the list of heirs according to the Mitakshara.

This identical question has been fully considered and decided in *Bhagwan v. Warubai* (1). We are bound by this decision, and in spite of an attempt made by the learned pleader for the appellant to question its correctness, I see no reason to doubt it. All the texts and the decided cases bearing on this question have been subjected to a critical examination in *Bhagwan's* case (1) and in the earlier case of *Mulji Purshotum v. Cursandas Natha* (2) which was a case under the Mayukha. It is needless to discuss them here over again.

While expressing my concurrence with the conclusion arrived at in *Bhagwan's* case (1), I shall briefly deal with the argument which has been pressed on behalf of the appellant on this occasion. Mr. Kelkar for the appellant concedes, and it must be conceded, that the sister has not been mentioned as an heir at all in the Mitakshara. He does not press for Balambhatta's interpretation of the word "bhratarah" in Yajnavalkya's text, as this Court has refused to accept Balambhatta's view, as it involves a complete departure from the order of succession accepted and advocated by Vijnaneshvara, and as it has been repudiated by Nilkantha in the *Vyavahara Mayukha*. But it is strenuously argued

(1) [1908] 32 Bom. 300=10 Bom. L. R. 389.

(2) [1900] 24 Bom. 563=2 Bom. L. R. 721.

that the sister has been recognized as an heir under the Mitakshara as understood in this Presidency, mainly on account of her having been expressly mentioned as an heir by Nilkantha, and that therefore under the Mitakshara she should be given the same position in the order of succession, as has been given to her under the Mayukha. It is argued that as she comes before the half-brother under the Mayukha, she must come in before the half-brother under the Mitakshara, i. e., before the brother's son, as the brother's son comes after the half-brother according to Vijnaneshvara. In my opinion this is a wholly untenable position. It is practically impossible to assign to the sister the same relative position in the list of heirs under the Mitakshara, as has been assigned to her under the Mayukha. Nilkantha gives her a distinct and definite position and brings her in after the grandmother and before the half-brother. Vijnaneshvara however gives a much higher place to the half-brother in the order of succession, and in several respects his order of succession is different from that adopted by Nilkantha. It is therefore clear that the sister cannot be placed after the grandmother and before the half-brother or before the brother's son at the same time under the Mitakshara. In fact it is not reasonably possible to reconcile the Mitakshara and the Mayukha so far as the relative position of the sister in the compact series of heirs is concerned.

There is a further difficulty in accepting the appellant's argument. It is not possible to place the sister before the half-brother without disturbing the compact series of heirs laid down by Vijnaneshvara. It is not right to disturb this compact series by introducing an heir who is not expressly mentioned by Vijnaneshvara.

Lastly, it was urged that the sister cannot be included among the gotrajas as understood by Vijnaneshvara and therefore she cannot be appropriately brought in anywhere unless she is placed before the half-brother. But I do not see any force in this argument, as Nilkantha in bringing the sister in after the grandmother says that she has all the qualifications of a gotraja. After all, the sister has been recognized as an

heir under the Mitakshara even though not mentioned by Vijnaneshvara, mainly because Nilkantha has expressly assigned her a high place in the list of heirs. There is nothing to render Nilkantha's view that she has the qualifications of a gotraja inapplicable to the Mitakshara.

Quite apart from the consideration however, whether under the Mitakshara the sister can be included among the gotrajas or not, it is clear that the sister cannot be placed higher than the grandmother. It has been held in *Rudrappa v. Irawa* (3) that she cannot be ranked any lower. The result therefore is that under the Mitakshara she comes next after the grandmother and a fortiori after the half-brother's son.

The second point relates to *res judicata*. In the previous litigation one Bhagirthibai, widow of Rangnath, was the plaintiff. She has filed a suit to recover the arrears of maintenance and the possession of a part of the family house for residence from Wasudeo, the separated brother's son, and the three full sisters of Bhagwan. Wasudeo, defendant 1, and one of the sisters, defendant 3, did not appear in the suit. The second sister, defendant 2, did not put in any written statement. The claim was contested by the third sister, defendant 4, on the ground that defendant 1 was in possession of the property. Though it was assumed by the trial Court in that case that the sisters—and not the nephew—would inherit Bhagwan's property, the question of heirship was neither raised nor decided. The present contesting parties were all arrayed as defendants in that suit. Defendant 1, Wasudeo, appealed against the decree, and it is significant to find that the sister co-defendants were not made parties to the appeal. The appellate Court passed a decree against the joint family estate of Martand without deciding any questions relating to the defendants inter se. It was made clear in the decree by the appellate Court that it would be open to defendants 2, 3 and 4 (i. e., the sisters) to sue defendant 1 in respect of any alleged wrongful possession during previous years. In order that any decision between co-defendants might operate as *res judicata* in any subsequent suit bet-

ween them it is necessary to establish that there was a conflict of interests among the defendants and that there was a judgment defining the real rights and obligations of the defendants inter se: see *Ramchandra Narayan v. Narayan Mahadev* (4). On looking at the judgments in the previous litigation it does not appear that the point as to who was Bhagwan's heir was really raised by the parties. At any rate the point was certainly not decided. Under these circumstances it is clear that the question of heirship is not *res judicata*.

In my opinion both the points fail, and the decree of the lower appellate Court in each case is confirmed with costs.

Heaton, J.—I am quite satisfied on a perusal of the judgment in and on a consideration of the circumstances of the previous litigation that there is no *res judicata* here. Further, I am prepared to follow as an authority the case of *Bhagwan v. Warubai* (1). In the obscurity which lies around these matters where the Mitakshara and Mayukha are in conflict, it seems to me that when a clear and definite decision has once been arrived at, that decision ought to be maintained and followed.

I therefore concur that both these appeals should be dismissed and the decrees of the lower appellate Court confirmed with costs.

G.P./R.K. Decree confirmed.

(4) [1887] 11 Bom. 216.

A. I. R. 1914 Bombay 136

BEAMAN AND HAYWARD, JJ.

Sakharam Mansaram—Plaintiff—Applicant.

v.

Golabchand Tarachand—Defendant—Respondent.

Application No. 107 of 1914, Decided on 21st August 1914, against Small Cause Court Judge, Poona, in suit No. 4783 of 1912.

Negotiable Instruments Act (1881), Ss. 9 and 118—Endorsee from payee of hundis is presumed to be holder in due course within S. 9 by reason of S. 118 (g) until contrary is proved.

An endorsee from the payee of a hundi must be presumed, until the contrary is proved, to be a holder in due course within the meaning of S. 9 by reason of S. 118 (g) and is unaffected by the failure of the consideration as between the drawer and the payee. [P 136 C 2]

J. Y. Abhyankar—for Applicant.

J. R. Gharpure and M. M. Kotashane—for Opponent.

Judgment.—The plaintiff sued as an endorsee of a hundi drawn by defendant 1 in favour of one Magan. Defendant 1 pleaded that no consideration for the hundi had been received from Magan, and an issue was raised whether there had been consideration as between defendant 1 and Magan. The learned Judge of the Small Cause Court, Poona, did not decide whether there had been consideration as between the plaintiff and Magan, but dismissed the suit on the issue mentioned, holding that there had been no consideration as between defendant 1 and Magan.

The plaintiff has now sought to have the decision set aside in extraordinary jurisdiction, on the ground that his suit as endorsee from Magan was not necessarily barred by the fact that there had been no consideration as between defendant 1, the drawer, and Magan, the payee. It appears to us that the plaintiff's position has been misapprehended and that his contention must be allowed. He must as endorsee be presumed, until the contrary is proved, to have been a holder in due course, that is to say, a holder for consideration from Magan within the meaning of S. 9 by reason of S. 118 (g), Negotiable Instruments Act. He would, therefore, unless the contrary should be proved, be unaffected by the failure of consideration as between defendant 1, the drawer, and Magan, the payee, under the provisions of S. 43, Negotiable Instruments Act, which provides that—"A negotiable instrument made, drawn, accepted, indorsed, or transferred without consideration, or for a consideration which fails, creates no obligation of payment between the parties to the transaction. But if any such party has transferred the instrument with or without indorsement to a holder for consideration, such holder, and every subsequent holder deriving title from him, may recover the amount due on such instrument from the transferor for consideration or any prior party thereto." There is therefore this material issue remaining for decision, namely whether the plaintiff was a holder in due course from Magan for consideration, that is to say,

whether he had accepted the hundi from Magan for consideration. The decree of the learned Judge of the Small Cause Court, Poona, must therefore, be set aside and the case remanded for a fresh decision in the light of the above remarks, after determining the issue: Whether the plaintiff was a holder in due course for consideration from Magan within the meaning of Ss. 9 and 43, Negotiable Instruments Act, having regard to the provisions of S. 118 (g) of the Act.

Costs to abide the result.

G.P./R.K. Case remanded.

A. I. R. 1914 Bombay 137

MACLEOD, J.

King, King & Co. and another—Plaintiffs.

v.

Major Francis D. Davidson—Defendants.

Original Civil Suit No. 303 of 1911 and F. C. Sub-Court Suit No. 290 of 1907, Decided on 10th February 1914.

(a) Civil P. C. (5 of 1908), S. 60—Salary of Indian Army Officer is exempt from attachment in execution.

Under S. 60, the salary of an officer in the Indian Army is exempt from attachment in execution of a decree. [P 137 C 1]

(b) Civil P. C. (5 of 1908), S. 60—Salary of Indian Army Officer attached and distributed among creditors—No objection from officer—It will not be refunded to him.

Where the salary of an officer in Indian Army has been attached, realized and distributed among his creditors without any objection having been preferred he is not entitled to a refund of the same. [P 133 C 1]

Nicholson and Moos—for Plaintiffs.

Inverarity and Captain—for Defendants.

Judgment.—Messrs. King, King & Co., obtained a decree against Major Davidson, then a Captain in the Indian Army, in Suit No. 303 of 1911, on 25th July 1911 for a sum of Rs. 4,454-15-3 and costs and further interest. In execution of the said decree the plaintiffs attached a moiety of defendant's pay, and in pursuance of such attachment the Deputy Controller of Military Accounts remitted to the Sheriff such moiety. Thereafter Amarchand Hajarimal & Co, who had obtained a decree against the same defendant in Suit No. 290 of 1907, in the Court of the First Class Subordinate Judge at Poona, transmitted their decree to this Court for execution, and

applied for rateable distribution between themselves and Messrs. King, King, & Co., under S. 73, Civil P. C. Rs. 2,384-2-11 paid to the Sheriff as aforesaid have been rateably distributed between the two execution plaintiffs. There is now in the hands of the Sheriff the further sum of Rs. 2,979-12-7, which in the ordinary course would be distributed in like manner. But on 20th January 1914 the defendant took out a summons in the Poona Suit No. 290 of 1907, calling upon the plaintiffs to show cause why the attachment levied by them on the salary of the defendant should not be raised and why the sum of Rs. 2,384-2-11 recovered by the plaintiffs under such attachment should not be refunded. On 24th January the defendant took out a similar summons against the plaintiffs in Suit No. 303 of 1911. I adjourned the summonses into Court, and they were argued before me on 2nd February.

In the face of the decision of a Bench of this Court in *Velchand Chaganlal v. Bourcheir* (1), counsel for the plaintiffs were unable to contend that the attachment on the defendant's pay could be continued. In that case the defendant was an Officer in a British Regiment; but the reasons given by the learned Judges for their decision equally apply to an Officer in the Indian Army. In *Calcutta Trades Association v. Ryland* (2) and *Watson v Lloyd* (3), the defendants were Officers of the Indian Staff Corps, and in both cases it was held that there was a distinction between an Officer of the Indian Staff Corps and an Officer of the Regular Forces. But no reference was made to S. 190, sub-S. 8, Army Act of 1881, from which it is clear that Officers of the Indian Staff Corporations or the Indian Army are also Officers of His Majesty's Regular Forces. Nor in either of those cases was any reference made to sub-S. 2, sub Cl. (b), S. 266, Civil P. C., of 1882. This has been reproduced in S. 60 of the Code of 1908, which was held in *Velchand Chaganlal v. Bourcheir* (1) to be a bar to the Court considering whether an Officer in the Army fell within the definition of "public officer" given in the Civil Procedure Code.

(1) [1912] 17 I. C. 13=37 Bom. 26=14 Bom. L. R. 777.

(2) [1897] 24 Cal. 102=1 C. W. N. 138.

(3) [1902] 25 Mad. 402.

Therefore, there can be no doubt that the defendant is entitled to receive his pay without any deduction, and that the attachment levied by the plaintiffs in Suit No. 303 of 1911 must be raised. The Sheriff must also pay to the defendant the sum of Rs. 2,976-12-7 which he realized under the attachment and which has not yet been distributed between the plaintiffs.

The question whether the plaintiffs can be ordered to refund to the defendant what has already been paid to them by the Sheriff under the attachment depends on whether the money so received by them can be considered as having been paid by the defendant under coercion, or money voluntarily paid under a mistake of fact. It was admitted by the defendant's counsel that he had had no objection to Messrs. King, King & Co. receiving the moiety of his pay under the attachment levied by them. It was only when he discovered that the plaintiffs in the Poona suit were obtaining a share in that moiety that he decided to question the validity of the attachment. It must be taken, therefore, that the money paid out by the Sheriff was not money paid under coercion. Nor was it money paid under a mistake of fact. It was paid because the defendant did not choose to apply to the Court to raise the attachment. If there was any mistake in the matter it was one of law, that is to say, the defendant must be taken as having under mistake considered that the attachment on his pay was permitted by law, though it is also possible that there was no mistake of any sort, the defendant preferring that Messrs. King, King & Co. should be paid their debt in this manner. Therefore, in my opinion defendant is not entitled to a refund of what has already been paid out to the execution plaintiffs.

It was suggested in argument that the defendant might be estopped from claiming a refund; and it is quite possible that the plaintiffs may have acted upon the belief arising from the defendant making no attempt to dispute the attachment that he acquiesced in it. But as far as this case is concerned, there is no evidence on which a case of estoppel could be founded.

G.P./R.K.

Order accordingly.

* A. I. R. 1914 Bombay 138 Full Bench

SCOTT, C. J., BATCHELOR AND
BEAMAN, JJ.

In re Punamchand Manik Lal—Applicant.

Criminal Revn. Appln. No. 5 of 1914,
Decided on 31st March 1914, against
Joint Judge, Ahmedabad.

* Criminal P. C. (5 of 1898), S. 195—
Income-tax Collector.

An Income-tax Collector is a Revenue Court
within the meaning of S. 195, Criminal P. C.
[P 141 C 1]

Velinkar and Retanlal Ranchhoddas—
for Applicant.

S. S. Patkar—for the Crown.

Order of Reference

Heaton, J.—The applicant in this case is a person against whom a complaint has been made of offences under Ss. 177, 193, 196, 199 and 471, I. P. C. It will be observed that these are all offences which are included in S. 195, Criminal P. C. They all arose out of what the applicant is supposed to have done in connexion with proceedings before an Income-tax Collector. Now undoubtedly an Income-tax Collector is a public servant, and as to the offence under S. 177, his sanction would be required under Cl. (a), S. 195, and what appears to be a sanction was in fact given by the Income-tax Collector. But it is now spent, or rather was spent, before this complaint was made because the complaint was made much more than six months after the sanction had been given. So far then it appears that as regards S. 177 these proceedings are not lawful in their inception and should be set aside. As regards the other Ss. 193, 196, 199 and 471, they are subject to precisely the same infirmity if the Income-tax Collector is a "Court" within the meaning of Cls. (b) and (c) S. 195. On this matter, i.e., whether an Income-tax Collector is such a "Court", there is a certain amount of authority which, in the main, favours the view that he is a "Court." But a Bench of this Court decided in 1906 that an Income-tax Collector is not a "Court" within the meaning of S. 476, Criminal P. C.: *In re Kalidas Rewadas* (1). If he is not a "Court" within the meaning of that section it is at least to me difficult, in spite of the definition of "Court" in

(1) [1906] 8 Bom. L. R. 477=4 Cr. L. J. 84.

S. 195, to suppose that he can be a "Court" within the meaning of the latter section, for the purpose of the two sections is very much the same and their connexions intimate.

In a very much later case [*In re Nanchand Shivchand* (2)] another Bench of this Court decided that a "District Judge" determining the validity of elections under S. 22, District Municipalities Act (Bombay Act 3 of 1901) is a "Court" within the meaning of Cl. (b), S. 195, Criminal P. C. The reasoning in Batchelor, J.'s judgment in that case is, it seems to me, a reasoning which, if applied to this case, would inevitably lead to the conclusion that an Income-tax Collector is a "Court". He is empowered to summon witnesses, to take evidence and under the Oaths Act he consequently may administer an oath. I cannot myself believe that if giving false evidence on oath to an Income-tax Collector is an offence under S. 193, I. P. C., and it is declared to be such an offence as covered by S. 37, Income-tax Act, no sanction should be required to prosecute such a person for giving false evidence, whereas sanction is required if the evidence is given, say for example before a Magistrate or a Sub Judge. It seems to me that the purpose of these provisions in S. 195 is that when false evidence is alleged to be given on oath, the prosecution shall not proceed without a sanction, and that the Code intends to make no distinction whatever between different cases provided that the oath may properly be administered and that the evidence may be taken. Otherwise in some cases, as for instance an Income-tax Collector's proceedings, complaints for giving false evidence might be made by any private person; they might be made out of ill-will and without the slightest foundation of truth and yet the Magistrate would be bound to deal with them. I can see no reason whatever for supposing that the section intends such a thing to happen when it specifically provides that in other cases sanction must be furnished. Therefore, not only does the reasoning in Batchelor, J.'s judgment seem to me to be opposed to the decision of *In re Kalidas Rewadas* (1), but it also appeals to me as being a reasoning which is correct in itself. But we cannot altogether dis-

regard the ruling in *In re Kalidas Rewadas* (1). Therefore it seems to me that we are bound to submit to a Full Bench this question :—

Whether an Income-tax Collector is or is not a "Court" within the meaning of that word as used in Cls. (b) and (c) of S. 195, Criminal P. C.

There is only one other point that needs attention in this matter. It was argued that because the complaint, which was made against this applicant, was lodged by a certain Mr. Lakhia by order of the District Magistrate or the Collector, and because the Collector is a public servant to whom the Income-tax Collector is subordinate therefore this complaint may be regarded as a complaint of the kind provided for in Cl. (a), S. 195. But that clause provides that the public servant concerned may either give a sanction or make a complaint, and that seems to me to exclude the idea that a public servant may make a complaint by any form of delegation. It seems to me that he must make the complaint, if he wishes to take that course, personally. If he does not wish to take that course personally, the delegation is obtained by giving the sanction. Similarly the Collector as superior officer, though personally, no doubt, he might make the complaint, cannot delegate the making of a complaint to another. So I do not think that the proceedings in this case can be supported by that argument.

If the decision of the Full Bench is that an Income-tax Collector is a "Court" then I think the whole of those proceedings must be set aside.

Shah, J.—I concur. This is an application to quash the proceedings arising out of a complaint lodged by Mr. T. P. Lakhia, the Resident First Class Magistrate of Nadiad, on 10th October 1913. The complaint purports to have been made with the sanction of the Income-tax Collector dated 23rd July 1912 and relates to offences which are mentioned in S. 195, Criminal P. C. It is clear that the complaint cannot be entertained by any Court, if the order of 23rd July 1912 is a sanction and if a sanction is necessary under the section. The order of 23rd July 1912 was made by the Income-tax Collector after giving due notice to the petitioner, and though the terms of the order do not place the mat-

(2) [1913] 18 I.C. 408=37 Bom. 865.

ter beyond dispute, it is fairly open to the construction that it is a sanction and not merely a departmental direction to prosecute. The complaint, so far as it relates to the offence under S. 177, I. P. C., can be taken cognizance of only with the previous sanction or on the complaint of the public servant concerned or of some servant to whom he is subordinate. Treating the Income-tax Collector's order of 23rd July as a sanction, the proceedings so far as they relate to the offence under S. 177, I. P. C., must be set aside as the sanction was not in force at the date of the complaint owing to the lapse of time. Even if it be not a sanction, the same result must follow, as there can be no doubt that the present complaint is not made by the Income-tax Collector or by his superior. The present complainant, who is the Resident Magistrate at Nadiad, has nothing to do with the Income-tax Collector or his superior, and, in my opinion, he can lodge the complaint only with the sanction of the proper authority.

As regards the other offences, which fall under S. 195, sub-S. (1), Cls. (b) and (c), the complaint is subject to the same objection, if the Income-tax Collector is a "Court" within the meaning of these clauses. It has been held by this Court in *In re Kalidas Rewadas* (1), that the Income-tax Collector is not a "Court" under S. 476, Criminal P. C. So far as the present point is concerned, I think the word "Court" would have the same meaning in S. 195, and *In re Kalidas Rewadas* (1), is therefore an authority for the view that the Income-tax Collector is not a "Court" within the meaning of Cls. (b) and (c), S. 195. No reasons are given in the judgment in support of this conclusion, and the ratio decidendi of *In re Nanchand* (2) clearly suggests that the conclusion in *In re Kalidas Rewadas* (1) is not correct. Apart from the decisions, the reason of the rule requiring a sanction or a complaint of the Court concerned in respect of certain offences is in favour of the view that the Income-tax Collector is a "Court." In a recent case the Madras High Court has held that the Income-tax Collector is a "Court:" see *In re Nataraja Iyer* (3). Having regard to the conflicting decisions, as well as to the

practical importance of the point, I think that the question formulated by my learned colleague should be referred to a Full Bench for decision.

Opinion.—The question referred for decision is, "whether an Income-tax Collector is or is not a "Court" within the meaning of that word as used in Cls. (b) and (c), S. 195, Criminal P. C.?"

The word "Court" is defined in the section by a limited and exclusive definition to mean a civil, revenue or criminal Court. It cannot be contended that the Income-tax Collector is a civil or criminal Court and therefore the only question is whether he at any time in the discharge of his functions under Act 2 of 1886 is a revenue Court.

The term "revenue Court" is not in general use, but it has been used occasionally by local legislatures in this country in connexion with the decision of questions relating to revenue by officers specially and exclusively empowered to decide them: see, for example, the City of Bombay Revenue Act and the Revenue Codes of Oudh, the United Provinces and the Punjab (U. P. Act 2 of 1901, Ss. 59, 62; U. P. Act 3 of 1901, Ss. 189 et seq.; Oudh Act 22 of 1886, S. 109; the Punjab Act 16 of 1887, S. 101). Speaking generally, revenue questions are removed from the cognizance of civil Courts and the officer charged with the duty of deciding disputed questions relating to revenue between the individual and the Government would be invested with the functions of a revenue Court. The inquiries into such questions assigned to officers empowered *eo nomine* as "revenue Courts" in the United Provinces are entertained and disposed of by corresponding officers in Bombay under Chap. 12 and 13, Bombay Land Revenue Code of 1879, though the words "revenue Court" is not to be found anywhere in those chapters. We have no doubt that the Bombay inquiries would be equally proceedings in revenue Courts in the sense in which that term is used in the definition clause of S. 195, Criminal P. C. We also think that inquiries conducted according to the forms of judicial procedure under Chap. 4, Income-tax Act, and execution proceedings under Chap. 5 (which provides that an order passed by a Collector on a petition under Chap. 4 shall have the force of a decree of a

civil Court in a suit in which the Government is the plaintiff and the defaulter is the defendant) are proceedings in a revenue Court.

The express exclusion from the term "Court" in S. 195 of a Registrar or a Sub-Registrar, though a legislative recognition of the correctness of the conclusion in *Queen-Empress v. Tulja* (4), does not affect the question now before us as to the scope of the term "revenue Court," for a Registrar or Sub-Registrar under the Registration Act could not by any strength of imagination be held to be a revenue Court. The Registration Act has its special group of sections corresponding with Chap. 11, I. P. C., and Ss. 195 and 476, Criminal P. C.

For the above reasons we answer the question referred in the affirmative.

G.P./R.K. *Reference answered.*

(4) 12 Bom. 36.

A. I. R. 1914 Bombay.141

HEATON AND SHAH, JJ.

Dinkar Hari Kulkarni—Defendant—Appellant.

y.

Chhaganlal Narsidas—Plaintiff—Respondent.

First Appeal No. 206 of 1912, Decided on 16th September 1913, from decision of Addl. First Class, Sub-Judge, Dhulia, in Civil Suit No. 695 of 1910.

(a) Limitation Act, (9 of 1908), Art. 116—Suit for money due on a bond is suit for compensation for breach of contract within Art. 166.

A suit, in form a suit for money due on a bond is in substance a suit for compensation for breach of contract within the meaning of Art. 116, Lim. Act and the period of six years provided in that Article applies if the bond is registered: 14 Bom. 377, Disc. 6 Bom. 75; 3 All. 600; 13 All. 200; 18 Cal. 506 and 31 Mad. 452, Ref. [P 141 C 2, P 142 C 1, 2]

(b) Limitation Act (9 of 1908), S. 19—Reference to previous mortgage debt in subsequent pronote passed for another debt by same mortgagor to mortgagee is acknowledgment within S. 19.

Where some years after executing a mortgage-deed the mortgagor passed a promissory note to the mortgagee for another debt and therein referred to the mortgage debt as an extra or additional debt.

Held: that such reference amounted to an acknowledgment within the meaning of S. 19, Lim. Act. [P 142 C 2]

Gadgil and A. V. Lele—for Appellant.

W. B. Pradhan—for Respondent.

Shah, J.—The present appeal arises out of a suit brought by the plaintiffs to recover money by sale of the mortgaged

property described in the plaint and in the alternative, in case a decree for sale of the property cannot be passed for a decree personally against the defendant. The bond is dated 17th June 1897 under which the defendant agreed to pay the amount of the mortgage debt in three instalments, the first instalment being payable on 5th June 1898 the second on 24th June 1899, and the third on 14th June 1900. The plaintiff relied also upon two acknowledgments contained in two promissory notes, dated 24th August 1903 and 11th August 1906 respectively. The suit was filed on 6th August 1910. The bond being attested only by one witness is inoperative as a mortgage-bond. The lower Court has, however, passed a decree against the defendant personally, holding that the plaintiffs' claim is within time.

In appeal it has been contended on behalf of the appellant before us that though the bond sued on is registered, the claim is beyond time inasmuch as Art. 66 and not Art. 116, Lim. Act, Sch. 1, is applicable, and that the acknowledgments which have been held by the lower Court to be good acknowledgments are really not acknowledgments within the meaning of S. 19, Lim. Act. It is also urged that the personal decree cannot be legally passed.

With regard to the first point reliance has been placed upon two cases, viz. *Ram Din v. Kalka Prasad* (1) and *Bulakhi Ganu Shet v. Tukarambhat* (2). On the strength of certain observations in these two cases it has been urged that where the suit is in form a suit on a bond Art. 66 should be applied, and not Art. 116, even though the bond may be registered. Several other cases have been cited at the Bar having reference to this particular point, and on a consideration of all the cases and the observations in the above two cases, I have come to the conclusion that the current of decisions, which is against the appellant's contention, is in no way disturbed by the observations relied upon by him. It has been held by all the High Courts in India that though the suit may be in form a suit for money due on a bond, still it is in substance a suit for compensation for breach of a

(1) [1895] 7 All. 502=12 I. A. 12=4 Sar. 619 (P. O.).

(2) [1890] 14 Bom. 377.

contract within the meaning of Art. 116 Lim. Act, and the period of six years provided in that article would apply if the bond is registered. I need refer only to the cases of *Ganesh Krishn v. Madhavray Ravji* (3), *Amritray Vinayak v. Vasudeo* (4), *Husain Ali Khan v. Hafiz Ali Khan* (5), *Naubat Singh v. Indar Singh* (6), *Umesh Chunder Mundul v. Adarmoni Dasi* (7), *Din Doyal Singh v. Gopal Sarun Narain Singh* (8) and *Srinivasa Raghava Dikshadar v. Rangasami Aiyangar* (9). It will thus appear that the Courts have consistently taken the same view both before and after the ruling in *Ram Din v. Kalka Prasad* (1). This view derives further support from the observations of the Judicial Committee in the case of *Kameswar Pershad v. Rajkumari Ruttan Koer* (10), where, in a suit based upon a registered instrument, it was observed that the period of six years and not a period of twelve years, would apply to the case.

With regard to the observations in the case of *Ram Din v. Kalka Prasad* (1) I may say that, having regard to the facts of that case, the only point which arose for decision was whether for the purposes of personal liability the period of twelve years under Art 132, Lim. Act, applied to the case. There was no point in that case as to whether the period of limitation applicable would be three years or six years. Therefore the observations in the case of *Ram Din v. Kalka Prasad* (1), about the shorter period of three years being applicable were not necessary for deciding the appeal. As the observations in the case of *Kameswar Pershad v. Rajkumari Ruttan Koer* (10) are in consonance with the current of decisions of the Indian Courts and in conflict with the dictum in the case of *Ram Din v. Kalka Prasad* (1) I think that it would be proper to accept the view which has found favour with the Indian Courts. As regards the case of *Bulakhi Ganu Shet v. Tukarambhat* (2), having regard to the facts of the

case, it is clear that it was not necessary to decide whether the period of limitation applicable was three years or six years. The observations of the learned Judges are based upon the dictum in the case of *Ram Din v. Kalka Prasad* (1) and upon two cases which on reference I find to have no bearing on the question as to whether to a suit on a registered bond Art. 66 or Art. 116 would apply I think therefore that the lower Court has rightly applied Art. 116 to the present case.

As regards the argument as to acknowledgments, I am of opinion that the words used in the two promissory notes do amount to acknowledgments within the meaning of S. 19, Lim. Act. I am unable to see why a personal decree cannot be passed. The only consideration urged by the learned counsel for the appellant is that as the bond provides that the executant is to pay the balance personally after the proceeds of the sale should be credited to accounts, and that as no sale can be effected under the bond, there is no liability whatever. The words in the bond, however, "as stated above I shall repay the amount with interest", contain a distinct undertaking to pay, and the effect of these words is in no way limited by the subsequent undertaking to pay the balance in case of deficiency.

I therefore affirm the decree of the lower Court with costs.

Heaton, J.—I concur.

G.P./R.K. *Decree confirmed.*

A. I. R. 1914 Bombay 142

SCOTT, C. J. AND BATCHELOR, J.

Chhogmal Balkisondas—Plaintiff—Appellant.

v.

Jainarayan Kanaiyalal — Defendant—Respondent.

Appeal No. 31 of 1913, Decided on 8th January 1914, from judgment of Macleod, J., D/- 16th June 1913 in Suit No. 636 of 1911.

Principal and Agent — Pakka adatyā — Principal bound by act of agent—Existence of pakka adat relationship does not of itself negative existence of understanding between adatyā and his constituent that no delivery should be given or taken under forward contracts and that only differences should be recovered.

Defendant, Amer Chand in Bombay, had a branch at Cawnpore. M was defendant's mu-

(3) [1881-82] 6 Bom. 75.

(4) [1882] P. J. 231.

(5) [1881] 3 All. 600=(1881) A. W. N. 33.

(6) [1891] 13 All. 200=(1891) A. W. N. 5.

(7) [1888] 15 Cal. 221.

(8) [1891] 18 Cal. 506.

(9) [1908] 31 Mad. 452=18 M. L. J. 477=5 M. L. T. 211.

(10) [1893] 20 Cal. 79=19 I. A. 234 (P. C.).

nim of the Cawnpore branch. Business relations between the plaintiff and the defendant's Cawnpore branch went on from 1901 to 1911. An adjustment of the accounts of the branch arrived at in 1908, when Rs. 81 was found due to the defendant, embraced accounts of forward transactions entered into by the munim in the name of the defendant. Between 1908 and 1910 the transactions between the plaintiff and the branch related solely to hundies, and there was no trace of the forward transactions in the branch books alleged to have been entered into between the plaintiff and M in 1910 and 1911. Plaintiff sued defendant for a balance of accounts on the basis of the transactions of 1910 and 1911. It was established that defendant visited Cawnpore from time to time but never himself examined the books. It was not contended that the plaintiff received any intimation that M's apparent authority to enter into forward contracts had ever been revoked :

Held : that the transactions in suit were within the apparent authority of M, that the existence of pakka adat relationship does not of itself negative the existence of an understanding between the adatyas and his constituent, that no delivery should be given or taken under forward contracts and that only differences should be recovered. [P 143 C 2; P 144 C 1]

Raikes, Strangman and Jinnah — for Appellant.

Setalvad and Moos — for Respondent.

Judgment.—This is an appeal from a decree of Macleod, J., dismissing a suit brought by the plaintiffs, who carry on business as shroffs, pakka adatyas and commission agents in Bombay, to recover Rs. 48,045-15-0 as a balance of account payable by the defendant on transactions in which the plaintiffs acted as the defendant's pakka adatyas. The balance appearing against the defendant is attributable to losses on forward contracts for the sale or purchase of silver, Bengal cotton, Broach cotton and linseed. All these losses occurred on contracts under which in fact no delivery was given or taken and all the contracts were entered into with the plaintiffs by Mangalchand, the munim of the defendant's Cawnpore branch. The defendant disputes the authority of Mangalchand to enter into forward contracts on his behalf and upon this contention arises the first point in the appeal. Mangalchand was the sole munim of the defendant at Cawnpore from 1897 to 1911, his remuneration being a share of six annas in the profits of the Cawnpore business.

There is no doubt that it is common for Marwari firms in the mufassil and their Marwari adatyas in Bombay to

enter into forward contracts for the purchase or sale of silver, cotton and seeds. The evidence of Jwaladas shows that the defendant's Cawnpore books record forward transactions of this description in 1958 (1900-01), 1959 (1901-02), 1962 (1905-06), and 1964 (1907-08). The books for 1961 and 1963 were not forthcoming at the time of Jwaladas' investigation and they have not been produced in this Court. The evidence establishes that the defendant visited Cawnpore from time to time but never himself examined the books. Business relations between the plaintiffs and the defendant's Cawnpore branch went on from 1901 to 1911 and it is not disputed that an adjustment arrived at in 1908, when Rs. 81 was found due to the defendant, embraced accounts of forward transactions entered into by Mangalchand in the name of the defendant. It is however the fact that between 1908 and 1910 the transactions between the plaintiffs and the defendant's Cawnpore firm related solely to hundis, and that of the forward transactions entered into in 1910 and 1911 no trace is to be found in the defendant's Cawnpore books.

It is probable that Mangalchand did not wish the defendant to know of the forward contracts he was entering into during that period with the plaintiffs, but it is not contended that the latter received any intimation that Mangalchand's apparent authority to enter into forward contracts had ever been revoked. On 1st April 1911 the defendant writes to the plaintiffs : "After having copied our account up to this day please write us information about any goods which may have been bought and sold through you." This information was supplied at once, but it is not till after 22nd April when the plaintiffs' solicitors wrote that at least Rs. 40,000 would be required as margin on the forward transactions that the defendant by his pleader's letter of 5th May informed the plaintiffs' solicitors that Mangalchand had no authority to enter into forward transactions.

The learned Judge was therefore right in holding the transactions in suit were within the apparent authority of Mangalchand and we agree with him in thinking that if the transactions had resulted in a profit to the defendant, the defence that Mangalchand had ex-

ceeded his authority would not have been put forward.

The defendant has however a second line of defence based on S. 30, Contract Act, on which he has succeeded in the lower Court. He pleads that all the orders given to the plaintiffs by Mangalchand to enter into forward transactions were in respect of wagering and gambling transactions and were entered into by the plaintiffs on that understanding. He also denies that the plaintiffs acted as pakka adatyas. The denial on the one side and the assertion on the other of the plaintiffs' employment as pakka adatyas were probably made with a view to support the respective cases of wager and no wager, but for the reasons given by this Court in *Bhagvandas v. Burjorji* (1) we are of opinion that the existence of the pakka adat relationship does not of itself negative the existence of an understanding between the adatya and his constituent that no delivery should be given or taken under forward contracts and that only differences should be recovered.

The plaintiffs' accounts show that the defendant was charged the usual pakka adat commission of six annas and four annas for brokerage. The plaintiff's journal entries which have been put in, namely Exs. 25 and 32, relating to the 1,000 tons of linseed and the 200 tons of rape seed for the April-May Vaida of 1911, show that the plaintiffs regarded the transactions as being on the defendant's or gharu private account, while the soda Vahi entry (Ex. 19) shows that of 300 bales of Broach cotton sold on the defendant's account for the Vaida of March 1911 two hundred were taken by the plaintiffs on their own private account. The plaintiff's gumasta Ramkissen deposes that the 800 bales of Broach cotton for the March Vaida, on which the defendant is debited with a loss of Rs. 13,225, was part of 2,600 bales bought and sold by the plaintiffs for the March Vaida of which a considerable proportion was taken on plaintiffs gharu or private account.

This is all consistent with the plaintiffs' contention that they were pakka adatyas of the defendant transacting business upon the terms of the Bombay

custom described in *Bhagvandas v. Kanji* (2), but it follows that *qua* the defendant they were principals and not disinterested middlemen bringing two principals together. The question then which we have to decide is, what on the evidence was the common intention of the parties with regard to the settlement or completion of the transactions referred to in the account annexed to the plaint.

The evidence of Mangalchand as to the manner in which these transactions were carried out is as follows :

"Such transactions were made in this way. The rates were out some twelve months prior to the due date : then the Bombay and Calcutta people used to inform their customers about the rates of different commodities : whoever found the rate to become cheap in future would sell and whoever considered the rate to become high in future would purchase. If at any time after this soda before the due date the purchaser found the transaction profitable he would re-sell by a telegram, otherwise on the due date the losses and profits used to be settled according to the rates. No delivery used to be given or taken on the due dates by the seller or purchaser respectively. As long as I dealt in such transactions I neither gave nor took any delivery of anything sold or purchased. There takes place no delivery at Bombay and so I never contemplated to take or give delivery of goods. Chhogmal Balkrishna's shop is at Bombay. I made satta transactions with the said firm and once or twice I sent ready goods also for sale. I made the same kind of satta transactions with Chhogmal Balkrishna as I have mentioned above with Madon and other adatyas of Bombay. In this case too no deliveries were contemplated or made."

The evidence of Ramkissen, the plaintiffs' gumasta, strongly supports the defendant's contention that under the forward contracts in question no deliveries were contemplated. That the contracts in respect of 60 chests of silver were purely by way of wager was admitted by plaintiffs' counsel before Ramkissen's cross-examination had begun. These contracts were made upon an order from defendant by wire on 23rd July 1910 to sell 60 silver and on 7th October 1910 to buy 50 silver. The con-

(1) [1913] 19 I.C. 29.

(2) [1906] 30 Bom. 205=7 Bom. L. R. 611.

tracts for all the other commodities were effected by wire in the same way. The wire of 7th October 1910 relating both to silver and to Bengal cotton may be quoted as an example: "Sell 50 silver Aso and 22nd January; reply." The telegrams include orders for sale and purchase of 800 bales of Broach cotton, a commodity not produced in the Cawnpore District. Besides these, 6,000 more bales of this cotton were bought or sold by the plaintiffs for the Vaida of March 1911, but no delivery was given or taken.

Coming now to commodities produced in the district in which Cawnpore is situate: the defendant gave telegraphic instructions to the plaintiffs to sell 200 bales of Bengal cotton on 7th October 1910 for the January Vaida, and on 24th January 1911 to sell the same amount for that Vaida. The plaintiffs in fact received no Bengal cotton from any constituents in 1966-67 or 1967-68, but they contracted for the sale or purchase of 2,700 bales upon which differences were paid or received.

Taking next linseed, another commodity produced in the Cawnpore District: the defendant gave instructions for the sale and purchase of 300 tons for the September Vaida. The transaction was settled by striking differences. The plaintiffs' linseed transactions for that Vaida were for 425 tons all of which were settled by payment of differences.

For the May Vaida the defendant instructed the plaintiffs by telegram to buy 1,000 tons of linseed in all and to sell 200, but none was delivered or received. For that Vaida the plaintiffs' linseed transactions amounted to 3,850 tons, but there were no deliveries, except 25 tons to a Bombay Marwari named Sadashiv Gambirchand some time after the defendant's repudiation of liability.

The mode in which the plaintiffs executed the defendant's order was that employed in executing the orders of all other Marwari constituents on forward contracts. They took for themselves on gharu or personal account such orders as they wished to reserve and passed on the others to other Bombay Marwaris through brokers (the *modus operandi* is well illustrated by the learned Judge in his detailed account of the defendant's linseed contracts for the September

Vaida). These Bombay Marwaris are a small body who, as the evidence of the invariable payment of differences suggests, almost certainly contract with a thorough understanding that no deliveries shall be called for or given. They only number 20 out of the plaintiffs' 300 constituents. The subsidiary contracts or *kabalas* are only accepted by the plaintiffs from Marwaris. There is no evidence that any of the Marwaris with whom the plaintiffs deal require produce for export. The plaintiffs' *gumasta* admits (1) that in 1966-67 or 1967-68 the plaintiffs did not deliver any Broach cotton for cash; (2) that during those years no constituents sent them Bengal cotton; and (3) that at the May Vaida of 1911, although it might have been profitable to buy ready linseed to fulfil forward contracts, this was not done in any case.

The first two of these admissions do not apparently apply to the business of sale on commission of tangible produce, for the plaintiffs' *gumasta* says:

"I can tell you from the books how much cotton, linseed and rapeseed was delivered for the last three years. The quantities delivered will appear in the weighment book. We receive ready goods for sale on commission from our constituents' cotton, linseed, and rapeseed. We receive linseed by the bag of two and a half Bengal maunds. We get from 4,000 to 5,000 bags a year. Last year we got 10,000 bales of cotton for sale on commission. We also received rapeseed for sale on commission. The figures will appear in the weighment books."

This business of sale of ready goods is a commission agency business the records of which are kept in a book which has no relation to the Vaida or forward business in which the defendant's losses were incurred.

Much reliance has however been placed upon certain letters which passed between the plaintiffs and Mangalchand from which the Court is asked to infer that Mangalchand intended and the plaintiffs expected the linseed contracts for the Vaida of May 1911 to be fulfilled by the delivery of linseed. And if this inference were accepted, the conclusion would be suggested that the evidence as a whole does not negative the possibility of deliveries under the other for-

ward contracts initiated by Mangalchand, even for other commodities such as Bengal and Broach cotton. In discussing the passages in the correspondence which are relied on, it is important to bear in mind that the time for fulfilment of forward linseed contracts for the May Vaida in Bombay is from the 15th to the 31st May.

On 3rd January 1911 (Ex. 65) the plaintiffs wrote: "Orders for many sodas (transactions) in silver are received from you by other people. No (orders are received) by me. What is the reason thereof? It does not become you to act in this way."

Mangalchand replied by Ex. N:

"You write to say that we do not send to your firm orders (for) business and that we send the same to some other firms. It is all right. We have not sent orders (for business) to anybody. Further, please write and let us know how you came to know that and to whom we have sent orders (for business). (As to) whatever work has been sent in these days the same has all been sent to your firm and not to any other place (i. e., firm). Ready goods have been more or less sent. The same have been sent to Tilokchand Mamraj. Goods used to be sent (to him) even formerly. Nowadays we do not venture to buy or sell any kind of goods. When we think proper we shall send orders (for business) to you. Please write and let us know when pakka information about linseed will be received. Please write about the tendency of silver market. Here rain has fallen all over the four directions. Owing to the fall of rain the crops will be still better. Please note this. The 5th of Pos Sood in (the Sambat year) 1967 (5th January 1911)."

This letter can hardly refer to forward contracts of produce for the defendant had in December given the plaintiffs orders for the forward purchase of 500 bales of Broach cotton and for the forward sale of 400 tons of linseed and 200 tons of rapeseed: see Ex. F. Mangalchand says that "nowadays they do not venture to buy or sell any kind of goods," which might intimate to the plaintiffs if intimation were needed that deliveries need not be expected under the forward contracts. The ready goods sent to Tilokchand Mamraj were 100 tons of poppy-

seed sent for sale on commission. They were sold to an export firm on railway receipts as soon as it was known the goods were on the way. The request for pakka information about linseed was not apparently made for the purpose of the forward contracts for on 7th January before a reply was received a telegraphic order to sell 200 tons of linseed at 12'3 was sent to the plaintiffs: see Ex. F.

On 8th January Mangalchand wrote Ex. O, in which after referring to the forward sale on the previous day of 200 tons of linseed he says:

"We think that all the commodities will fall (in price) after five (or) seven days. The crops in this district are very abundant. On arrival of the goods appertaining to the crops the market will go down considerably. Further, everything is under the control of Thakurji. Shall we send ready goods to you? If you can exert yourself in selling the same please write (to us). Samvat 1967."

On the 9th Mangalchand writes (Ex. P):

"You have written to say that you have sold cotton and linseed. We have brought the same to account as written by you and have already sent a chithi (i. e. letter). The same must have reached (you). By what time will the pakka report about linseed and that of Indian and American (cotton) come? Please write positively (about the same). With regard to the produce of linseed in India it is conjectured that it will be four times more than that of the last year; it is in the hands of Thakurji. Ready goods will begin to arrive within one month when bazar will go down positively. The bazar will surely not be so (brisk)."

On 20th January the plaintiffs complain (Ex. 67):

"Further you send orders on Bhai Bhikamchand Balkisandas for many sodas (transactions) in silver."

To which Mangalchand replies on 22nd (Ex. Q):

"You write that our orders for silver business are received at Bhikamchand Balkisson's. How do you write this way? We have never had any occasion even for correspondence with them nor are they our commission agents, Further nobody has in these days

orders for silver business. We shall send the orders to you."

On 21st January (Ex. S) the plaintiffs sent an account of transaction for the year 1966 showing Rs. 1,194 due to the defendants.

On 28th January (Ex. 68) they wrote:

"Moneys have not been received from you. Do you be good enough therefore to send the same."

To this demand Mangalchand takes exception in Ex. T on 8th February as no moneys were due by him on the account and if money is wanted to meet losses on the Bengal cotton contracts, particulars should be sent. He then proceeds as follows :

"We shall remit the moneys in respect of the loss twenty days before the month in which the due date is to fall. Do you please rest assured. We shall of course send linseed to you. At Jamnapur the produce of linseed is very large. Our man will go to attend to the purchases. Ready linseed will be sent. Please rest satisfied. Further we have written to the linseed merchants. Those people will send all the goods. Further please be writing about the tendency (of the market) as to silver. Please send a letter containing full particulars. Please write about business, if any. We shall send to you ready linseed entirely. Further, our instructions for the purchase of lai (i. e. a kind of seed) have been sent to all places. The lai received at present is of inferior quality. Dry goods will be received in ten days' time when purchases will be commenced and lai will be sent to your place. Please note that. Please send a letter containing full particulars."

The promise to remit moneys is very vague. It can hardly refer to the loss on the Bengal cotton contracts the Vaida for which had expired. It was apparently intended as a comforting assurance that the defendant would fulfil his engagements. The references to ready linseed have been much relied on by the plaintiff's counsel as showing an intention to deliver everything that was due on the linseed contracts. At this time however the buyer could not be forced to take delivery under a contract for the May Vaida, nor at any date before 15th May. The references to all the linseed may be reasonably

explained as meaning that all that might be brought in by merchants would be consigned to the plaintiffs "ready" i. e. for sale commission.

On 9th February the plaintiffs wrote (Ex. B in appeal) that the linseed market was entirely upwards (teji) and people expected it to go to Rs. 15.

On 10th February Mangalchand writes (Ex. 5):

"We shall send all the linseed ready on the arrival of linseed: the market will go down considerably."

He seems here to propose to send all the ready linseed available in order to depress the market which was going against him for the Vaida contracts.

To the same effect is Mangalchand's letter (Ex. W), 13th February :

"We think that immediately after consignment of the goods appertaining to the crops there will be a considerable fall. We shall purchase as much as we possibly can. There is still fifteen or twenty days for the arrival of new goods."

On 16th February Mangalchand writes (Ex. X) acknowledging receipt of the account sent by the plaintiffs (showing a loss of over Rs. 7,000) in respect of the January Vaida and promising to bring the items to account. He then says he will begin purchasing linseed in twenty days.

On 20th February (Ex. Y) he writes:

"Purchases of ready goods have commenced. We shall send you the railway receipts in respect of linseed and lai in the course of 10-15 days. Please consider the same to be as good as received."

On 25th February (Ex. Z) he writes:

"The linseed market will again go down. When the Jamnapur linseed arrives (the market) will go down at once. Thakurji (god) willing it will arrive within fifteen days."

On 9th March (Ex. A) he writes:

"Further, we are going to send a man to you with whom we shall also send the railway receipt in respect of the ready goods. Please exert yourself in transacting the business. Please be writing the rates of ready lai and linseed. The man will reach (you) in five to seven days. Please transact the business of the ready goods with profit. We shall send the same in large quantities. Please rest assured."

The reply of 12th March (Ex. 70) shows that the plaintiffs understood this to mean that Mangalchand was sending a man with ready linseed which the plaintiffs were to sell profitably: not to deliver or to hold against forward contracts already made. The plaintiffs' next letter, Ex. 71, of the 19th March was in reply to a telegram from Mangalchand of the 16th instructing them to buy 300 bales of Broach cotton. This would close his Broach cotton transactions the Vaida for which began on 15th. These Broach transactions had gone against him and showed a loss of Rs. 13,000 which made him a debtor to the plaintiffs in Rs. 12,000. The plaintiffs then show anxiety that the settling contract should be acknowledged.

They write:

"Having entered into a soda (transaction) as mentioned above, I wrote intelligence (with regard to the same) by wire. Do you be good enough to write acknowledging receipt (of the telegram). Do you be good enough to write and send intelligence about your having made a note of the soda (transaction). Further the market for linseed is steady (powga). The tendency is up (teji). You wrote that you would send ready goods, but the same have not been sent. Therefore (to) be good enough to write information (samachar) about squaring up the soda."

It is upon the last sentence in the above extract that the plaintiffs have placed their chief reliance in this appeal. Assuming it is said that the promises to send all the ready linseed, or all the linseed ready, mean that the linseed would be sent to be delivered against the outstanding forward contracts of sale, the result of not sending the ready linseed is that the linseed contract must be settled in another manner. "To" (therefore) they say, introduces the consequence of the failure to send ready linseed.

It appears to us for the reasons already indicated in our comments on the correspondence, that the first step in this argument breaks down. The promise was to "bear" the market with large consignments of ready linseed for sale on commission, not to fulfil the outstanding contracts by premature deliveries. Mangalchand's failure to perform this

promise may, when taken in connexion with the present loss on Broach cotton, have caused the plaintiffs to press Mangalchand to settle the forward contracts still outstanding. We are however by no means satisfied that this is the true purport of the last sentence. It is, we think, more probably a Marwari iteration of what has gone before concerning the closing Broach contract. An instance of the custom of iteration and re-iteration will be found in another much discussed letter (Ex. T) which closes by asking for the third time for a letter containing particulars although the request has no connexion with that part of the letter which immediately precedes it.

Speaking generally the correspondence of Mangalchand only indicates a desire to keep the plaintiffs in good humour by promises which he had no intention of performing, while Ex. 71 will not support the edifice of inference which the appellants' counsel would have us build upon it.

We are of opinion for the above reasons that the learned Judge was right in his conclusions. We are unable however to agree that the defendant who successfully pleaded a lawful defence was not entitled to his costs. We affirm the decree in so far as it dismisses the plaintiffs' suit, but vary it by ordering that the plaintiffs do pay the defendant's costs. The plaintiffs must also pay the defendant's costs of the appeal.

G.P./R.K.

Decree varied.

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BEAMAN AND HAYWARD, JJ.

Chhotalal Hirachand—Defendant—Appellant.

v.

Jethalal Varajbhai — Plaintiff—Respondent.

First Appeal No. 62 of 1913, Decided on 12th August 1914, against order of First Class, Sub-Judge, Ahmedabad, in Civil Suit No. 659 of 1913.

Civil P. C. (1908), O. 39, Rr. 1 and 2—Temporary injunction restraining defendant from taking possession of property is not within Rr. 1 and 2 and cannot be granted to person defeated under R. 99, O. 21 and suing under R. 103—Civil P. C., O. 21, R. 99—Civil P. C., O. 21, R. 103.

A temporary injunction restraining defendant from taking possession of the property in suit is not within the terms or the intention of O. 39, Rr. 1 and 2, and cannot therefore be

granted to a person who, after being defeated under O. 21, R. 99, brings a suit under R. 103 of the same order. [P 149 O 1]

G. S. Rao and T. R. Desai—for Appellant.

G. K. Parekh—for Respondent.

Judgment.—Without going into the entangled story of the litigation which has preceded the present suit, it is enough for all purposes of this appeal to say that the plaintiff after having been defeated under O. 21, R. 99, has brought a suit under R. 103 of the same order. In that suit he sought for and obtained from the trial Judge a temporary injunction restraining the defendant in the suit from taking possession of the property. Such a temporary injunction, we think, cannot be brought within the terms or the intention of O. 39, R. 1 or 2. It was therefore not within the competence of the learned Judge below to grant the temporary injunction complained of, and we think that this appeal must be allowed, and the order granting the plaintiff a temporary injunction must be set aside and that injunction dissolved. Costs to be costs in the cause.

G.P./R.K. Rule made absolute.

**** A. I. R. 1914 Bombay 149
Full Bench**

SCOTT, C. J., HEATON, MACLEOD, SHAH
AND HAYWARD, JJ.

Chanmalswami Rudraswami and another—Defendants 1 and 2—Appellants.
v.

Gangadharappa Baslingappa and another—Plaintiffs—Respondents.

Second Appeal No. 586 of 1912, Decided on 15th October 1914, from decision of District Judge, Dharwar, in Appeal No. 190 of 1911.

**** Civil P. C. (1908), S. 97**—Decision on preliminary defence that matters in dispute were caste questions and hence outside of civil Court's jurisdiction is not preliminary decree within meaning of S. 97—Civil P. C., S. 2 (2).

A decision as to misjoinder, limitation or jurisdiction does not amount to a preliminary decree within the meaning of S. 97. Therefore a decision in favour of a plaintiff upon a preliminary defence that the matters in dispute were caste questions outside the jurisdiction of civil Courts, does not amount to a preliminary decree from which the unsuccessful party must at once appeal by reason of S. 97 of the Code.

[P 152 O 1]

D. A. Khare—for Appellants.

Dhurandhar and G. S. Mulgaonkar—for Respondents.

Order of Reference

Beaman, J.—We think that in the present state of the authorities, the general question, what is and what is not a preliminary decree, needs to be considered by a Full Bench. We are sensible of the difficulty of stating the question in a sufficiently clear-cut and definite form. But this Court appears to have held that decisions on various points are preliminary decrees, and we feel grave doubts, not only whether the particular decisions are right, but much more, whether the reason underlying them is not capable of extension so as to cover a trial Court's ruling upon every disputed point arising during the trial. I find for example that I was myself a party to a ruling of this Court in *Sidhanath v. Ganesh* (1), which certainly seems to have held that the finding of an original Court upon three points—(1) misjoinder, (2) limitation, (3) jurisdiction—was in each case a preliminary decree. Upon further reflection, a careful examination of the cases bearing on the point and the definition of decree in the Code, along with every section contained in the Code which can throw any light upon the subject, I am convinced that that decision is wrong, that it goes much too far, and that if such findings really are preliminary decrees, it would be virtually impossible to deny that any ruling as to whether a document tendered were admissible or not, or a question objected to, relevant, would also be a preliminary decree.

Scott, C. J., who delivered the judgment in *Sidhanath v. Ganesh* (1) subsequently held in *Rachappa v. Shidappa*, Civil Application No. 21 of 1913, decided on 9th April 1914 (unreported), that a decision of this Court upon a question of jurisdiction was not a decree giving the parties aggrieved by it a right of appeal to the Privy Council. These decisions certainly appear to be in conflict with each other.

Having regard to the definitions of a "decree" and "a preliminary decree" in the Civil Procedure Code, I have formed a very strong opinion that no finding by a trial Court upon such points as limitation or jurisdiction where that finding is in favour of the plaintiff and permits the suit to proceed can, in any true

(1) [1913] 17 I.C. 687=97 Bom. 60.

sense, be a preliminary decree. It further seems that virtually every true preliminary decree is actually provided for in the Code itself. A comparison of these with the class of findings I have just mentioned brings out the radical distinction in principle between them with sufficient clearness. For my own part, I would go even further, notwithstanding the current of authority in this Court, and doubt, with all becoming respect, whether in suits under the Dekkhan Agriculturists' Relief Act a finding in limine that a party is or is not an agriculturist within the meaning of the Act, is a preliminary decree. That is a more difficult case requiring a finer analysis. But in every such suit the plaintiff claims some concrete relief he wants money or land, and a finding that he (or a defendant) is or is not an agriculturist does not conclusively determine any such right, but merely determines procedure, as a result of which the rights put in controversy will be settled and decreed. It is true that in many cases status alone may be decreed, and all such decrees are of course true decrees. But they are not preliminary. If the suit is for declaration of status, a decree conferring or refusing to confer that status concludes the suit, and leaves nothing more to be done.

But in suits under the Dekkhan Agriculturists' Relief Act, a finding that a party is or is not an agriculturist, does not determine any of the substantial rights which the Court is asked to give or withhold. It is true that it is a matter in controversy in respect of which the rights must be determined. But so is every detail of procedure and rule of evidence more or less directly. As I understand the definition, it describes two things: (1) The legal rights of the parties which are to be decreed or not decreed. These are in a vast majority of cases concrete, as a sum of money or piece of land or house or some other form of real or personal property. (2) The said rights in respect of any or all the matters in controversy. This means, as I understand it, everything which is necessary in law, during the course of a trial, to the establishment or refutation of the alleged right. Every fact which a plaintiff alleges and a defendant denies comes under this head, as well as all the rules of procedure and evidence which

have to be enforced and followed during the trial. But these latter are means to an end, and the end is the right or rights claimed, and to be or not to be decreed. The far wider construction put upon the words in this Court is, in my opinion, uncalled for and will lead in practice to the most disastrous consequences. The conduct of civil business is already slow enough, but how can it ever be finished if the trial Judge has to frame twenty preliminary "decrees" in the course of every trial and so open the door to twenty successive appeals before any decision on the merits has been given? Upon this subject I may be permitted to call attention to the weighty words of their Lordships of the Privy Council in *Maharajah Moheshur Sing v. The Bengal Government* (2). This is not a question of mere words, empty dialectic, but of great and far-reaching practical importance. I believe that this Court stands alone in the extension it has given to the meaning of the term "preliminary decree," and in view of the steadily increasing number of appeals from what are called preliminary decrees, and may fairly be said to have been held to be preliminary decrees by this Court, and the resultant delays, expenses and harassments to which suitors are being subjected, it is very desirable that the whole question should be fully considered and authoritatively settled by a Full Bench.

Hayward, J.—The plaintiffs sued defendants for an injunction in respect of certain religious ceremonies. The defendants raised a preliminary defence that the matters in dispute were caste questions outside the jurisdiction of the civil Courts. The original Court held that the matters were within the jurisdiction of the civil Courts. The District Court held on first appeal that this decision was not appealable at that stage, as it did not amount to a preliminary decree within the meaning of S. 2, Civil P. C. This Court has been asked to hold on second appeal that the decision was a preliminary decree and subject as such to appeal, relying on the cases of *Krishnaji v. Maruti* (3) and *Sidhanath v. Ganesh* (1), in which it was held res-

(2) [1857-59] 7 M.I.A. 283=3 W.R. 45 (P.C.)=
1 Suth. 325=1 Sar. 645=19 E.R. 316.

(3) [1910] 7 I.C. 966.

pectively that the decision as to the defendant being an agriculturist and the decisions as to misjoinder, limitation and jurisdiction were preliminary decrees inasmuch as they determined the rights of the parties with regard to matters in controversy in the suit within the meaning of S. 2, Civil P. C.

It has however been conceded that these decisions, if pressed to their logical conclusion, would cover all interlocutory orders passed in the suit; a result strongly condemned by the Privy Council in the following terms: "We are not aware of any law or regulation prevailing in India which renders it imperative upon the suitor to appeal from every interlocutory order by which he may conceive himself aggrieved, under the penalty, if he does not so do, of forfeiting forever the benefit of the consideration of the appellate Court. No authority or precedent has been cited in support of such a proposition, and we cannot conceive that anything would be more detrimental to the expeditious administration of justice than the establishment of a rule which would impose upon the suitor the necessity of so appealing; whereby on the one hand he might be harassed with endless expense and delay and on the other inflict upon his opponent similar calamities," in the case of *Maharajah Moheshur Sing v. The Bengal Government* (2) under the old Civil Procedure Code. It has been further pointed out that it was held in *Rachappa v. Shidappa*, Civil Application No. 21 of 1913, decided on 9th April 1914, (unreported), under the present Civil Procedure Code, that a decision upon jurisdiction by the High Court had only the effect of regulating procedure and decided none of the rights of the parties for purposes of appeal to the Privy Council. It is necessary in all these circumstances to examine with particular care all the provisions relating to preliminary decrees contained in the present Civil Procedure Code, before coming to the conclusion that a result so strongly condemned by the Privy Council has been intended by the legislature. No doubt, such a result might be deduced from a literal interpretation of the words of the definition, "decree means the formal expression of an adjudication which determines the rights of the parties with regard to all or any

of the matters in controversy in the suit" and of the explanation, "a decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit" in S. 2 (2). But it would appear that a limited interpretation was contemplated and that the adjudication determining the rights of the parties was meant to be an adjudication after a complete hearing of the case, because it has been provided that only after such a hearing should judgment be pronounced and be followed by decree by S. 33.

This has been made still clearer by the rules relating to the hearing of the suit. It has been provided that preliminary issues of law should be tried if those issues would dispose of the suit, by O. 15, R. 2, and that if the finding should not be sufficient for the decision there should be a postponement of the hearing of the suit, but that if the finding should be sufficient for the decision judgment should be pronounced, even though the hearing should not have been fixed for the final disposal of the suit by O. 15, R. 3. It has been further provided that only after the case has been heard, should there be judgment and that there should be a finding on each issue unless a finding on one or more issues should be sufficient for the decision of the suit, and that the judgment should be the basis of the decree and that the relief granted or other determination of the suit should be clearly specified in the decree, by O. 20, Rr. 1, 5 and 6. The limited interpretation contemplated has been indicated with sufficient precision by the following rules, which specify the cases in which preliminary decrees may or shall be passed in anticipation of the prescribed final decrees. The cases are administration suits, suits for dissolution of partnerships, account suits and suits for partition, dealt with in O. 20, Rr. 13, 15, 16 and 18. The only other preliminary and final decrees provided are those in mortgage suits under O. 34. Special forms for these preliminary and final decrees have been prescribed in Appendix D, Nos. 3, 4 to 11, 17 to 20 and 22 of Sch. 1. It has then been provided that if a preliminary decree should not give satisfaction there must be an immediate appeal and that the questions thereby decided

should not be open to dispute on appeal from the final decree by S. 97. But it has been recognized that there well might be many interlocutory orders, not appealable as orders under S. 104 and not amounting to decrees, which might seriously affect the final decision of the suit and it has been expressly provided that such orders should be open to consideration on appeal from the decrees, by S. 105, Civil P. C. It appears to me incontrovertible in view of all these provisions that the limited interpretation indicated has throughout been contemplated and that the only preliminary decrees sanctioned have been exhaustively enumerated, subject of course to extension by further rules lawfully framed, and that in all other cases the final determination of the suits has been required before preparation of the decrees. This limited interpretation has moreover the merit of avoiding the evils so strongly condemned by the Privy Council, and there would be a strong general presumption against any other interpretation out of respect for the legislature.

This matter is of far-reaching consequence to the administration of justice and should therefore, in my opinion, be referred for final decision by the Full Bench.

Judgment.—The question arising in the suit in which this reference has been made is whether, a decision in favour of the plaintiff upon a preliminary defence, that the matters in dispute were caste questions outside the jurisdiction of civil Courts, amounts to a preliminary decree from which the unsuccessful party must at once appeal by reason of S. 97 of the Code and the referring judgments call attention to *Sidhanath v. Ganesh* (1), in which it was held that decisions as to misjoinder, limitation and jurisdiction are preliminary decrees. This Court is of opinion that the judgment in the last-mentioned case was wrong and that such decisions are not preliminary decrees, nor is the decision in the referred case a preliminary decree. We also think certain dicta in *Narayan Balkrishna Kulkarni v. Gopal Jiv Ghadi* (4), which are based upon *Sidhanath v. Ganesh* (1), go too far.

G.P./R.K.

Reference answered.

A. I. R. 1914 Bombay 152

SCOTT, C. J. AND BATCHELOR, J.

Sitaram Bhimaji Deshpande and another—Defendants—Appellants.

v.

Sadhu Awaji Parit and another—Plaintiffs—Respondents.

Second Appeal No. 811 of 1912, Decided on 13th October 1913, from decision of Ag. Dist. Judge, Satara, in Appeal No. 11 of 1910.

Landlord and Tenant — Ejectment suit against tenant from year to year—Title carrying right to possession must be established by the plaintiff.

In a suit for ejectment against a tenant from year to year, not being a possessory suit brought within six months of a wrongful dispossession, the plaintiff, in order to succeed, must establish such title as carries a present right to possession, and the defendants are entitled to rely on the *jus tertii* appearing from the facts adduced by the plaintiff to defeat his claim. [P 154 C 1]

Strangman and S. R. Bakhale—for Appellants.

Binning and K. H. Kelkar—for Respondents.

Judgment.—The plaintiffs brought this suit in 1903 to recover possession of land alleging that in 1899 they had been wrongfully deprived of their possession by Raghunath Ramchandra who and the defendants who derive title under him, have been in wrongful possession ever since. The defendants pleaded that Raghunath was the owner and that the plaintiffs had been his tenants until they relinquished the property as they could not pay the rent.

The learned Subordinate Judge raised four issues: 1st, whether before 1899 the plaintiffs held the property under the Swami of Chaphal or under Raghunath Ramchandra; 2nd, whether the plaintiffs gave up possession voluntarily; 3rd, whether the defendants were entitled to retain possession against the plaintiffs; and 4th as to the mesne profits recoverable by the plaintiffs. His findings were that the plaintiffs held under the Swami of Chaphal and not under Raghunath; that the plaintiffs did not give up the possession voluntarily; and that the defendants were not entitled to retain possession against the plaintiffs.

The Assistant Judge, Mr. Ferrers, in appeal reversed the decision of the Subordinate Judge holding that a tenant who could not prove a right of perma-

ment occupancy, which was the plaintiffs' position, could not after eight years recover on the strength of his previous possession. He held that as the plaintiffs had failed to prove title as mirasi tenants they must be presumed to have been tenants from year to year and that their title being to an annual tenancy had long since expired, for they had withdrawn from the land for eight years. He accordingly allowed the appeal.

His decree was set aside by the High Court and the case remanded for trial to the appellate Court on the ground that if the plaintiffs had been in possession as tenants from year to year and the defendants thereafter came into possession by dispossessing them the defendants could only retain possession by showing a better title and that the defendants' evidence as to title must be investigated.

The appeal was re-heard on remand by the District Judge, Mr. Baker, who raised four issues as follows: 1. Who have got the occupancy rights to the land? 2. Have defendants a better title? 3. What is the nature of plaintiffs' possession? 4. Whether the defendants have wrongfully dispossessed plaintiffs.

He held, quoting from the remand judgment, that the dispossession by the defendants appear to be wrongful as they had not shown a better title than the plaintiffs saying that that disposed of issues 2 and 4 and that "as regards issues 1 and 3" the learned counsel for respondents says: "plaintiffs do not prove their title and it is not necessary. As their kaul is not proved there would be some difficulty in doing so. They may be taken to be tenants of the Swami of Chaphal; still they are entitled to possession as against defendants."

He therefore dismissed the appeal with costs.

The case now comes up for the second time in second appeal.

This is a suit based upon title. It is not a possessory suit brought within six months of a wrongful dispossession, but a suit against defendants who had been in possession for eight years. The presumption of right arising from possession applies as much to a defendant as to a plaintiff: see *Jowala Buksh v.*

Dharum Singh (1), and the fact of possession within 12 years of suit will not avail the plaintiff unless it is shown to be such a possession as gives a better title to the land than the defendant can show: see *Dharani Kanta v. Gobar Ali* (2). To succeed in ejectment it is only necessary for the plaintiff to establish such title as carries a present right to possession.

The Assistant Judge, Mr. Ferrers, having found the plaintiffs, on failure to prove their title as permanent tenants to be only tenants from year to year, thought that so far as their previous possession was equivalent to title it was a title which was annual only and which for want of renewal had long ceased to be; but he failed to recollect that ordinarily, unless there is an express agreement for the expiry of a tenancy on a certain day, a tenancy from year to year is only determined by a notice to quit. He found, it is true, that the plaintiffs had withdrawn from the land, but that finding for some reason, which does not appear on the remand judgment, was not accepted by the High Court. The District Judge, Mr. Baker, said that the alleged relinquishment of the land by the plaintiffs was to be received with great suspicion, but only held that there had been a wrongful dispossession as a legal inference arising from the pronouncement in the remand judgment. It seems to us that upon the admitted facts it would be a reasonable inference that as the plaintiffs had not asserted their right as yearly tenants for eight years, they must be taken to have abandoned the tenancy or to have relinquished such other occupancy rights as they might have and if so they would have no present right to possession such as would entitle them to maintain a suit for ejectment. The only cases cited to us as establishing the plaintiffs' right as yearly tenants to maintain ejectment were *Doe dem. Hughes v. Dyeball* (3) and *Krishnarav Yeshwant v. Vasudev Apaji Gotikar* (4) in which there was no delay

(1) [1863-66] 10 M. I. A. 511=19 E. R. 1066.

(2) [1913] 18 I. C. 17=15 Bom. L. R. 445=13 M. L. T. 185=(1913) M. W. N. 157=17 C. W. N. 389=17 O. L. J. 277=25 M. L. J. 95 (P.C.).

(3) [1829] Mood. & Malk 346=8 Car. & P. 610.

(4) [1884] 8 Bom. 371.

by the tenant in suing the trespasser and therefore no possibility of such an inference as seems to arise in the present case.

Counsel for the appellants contends that on the facts found by the District Judge the plaintiffs have no title. It is not disputed that the inamdar of the land was the Swami of Chaphal and the plaintiffs attempted to prove a permanent lease by the Swami in their favour. The proof failed as the lease was held to be a forgery. The payments made by the plaintiffs for the land while their possession continued are held to have been made either to Ramchandra, the khatedar, or to the village officers as assessment and not as rent. These facts it is contended, show no tenancy by the plaintiffs and prove that the title is and was actually in the Swami. The defendants are entitled to rely on the *jus tertii* appearing from the facts adduced by the plaintiff to defeat his claim: see *Doe dem. Carter v. Barnard* (5). Defendants' counsel also relies upon *Nagle v. Shea* (6) in which it was held that the defendant in ejectment might set up and prove *jus tertii*. Sir Frederick Pollock, in *Pollock and Wright on Possession*, p. 98, thinks this case conflicts with *Davison v. Gent* (7). The passage in *Bramwell B's judgment* in that case is not clear owing to the equivocal use of the pronoun "he," but here at all events the plaintiffs' own case discloses the *jus tertii* and brings the case within *Doe dem. Carter v. Barnard* (5). In this connexion we may observe that *Jefferies v. G. W. Ry. Co.* (8), relied upon by the Court in *Ali v. Pachubibi* (9) to show that a *jus tertii* cannot be set up in a suit for possession, was an action in trover for chattels.

In our opinion the plaintiffs have failed to prove title, that is, a present right to possession of the land in suit.

There are, moreover, facts found which show that Raghunath Ramchandra was the plaintiff's superior

holder," as that term is defined by the Land Revenue Code, and in that capacity Raghunath Ramchandra got decrees in assistance suits against the plaintiffs in 1899 and 1900 under S. 86 of that Code. It is no answer to say, as does the District Judge, that the decisions were *ex parte* and the plaintiffs did not appear. These proceedings together with the fact that Raghunath Ramchandra and since him the defendants have been the khatedars of the lands in suit are evidence of a title in the defendants which must prevail against the failure of the plaintiffs to prove any title.

We reverse that decree and dismiss the suit with costs throughout.

G.P./R.K.

Decree reversed.

* A. I. R. 1914 Bombay 154

BEAMAN, J.

Hirji Khetsey & Co.—Plaintiffs.

v.

B. B. & C. I. Ry. Co.—Defendants.

Original Civil Suit No. 963 of 1912,
Decided on 13th March 1914.

*(a) Contract Act (1872), Ss. 151 and 152—Goods entrusted to Railway Company for carriage destroyed while in its possession—Burden of proof of want of negligence lies on Company—Standard of negligence given in sections—Principles in leading cases stated—Railways Act, S. 76.

When anyone has entrusted goods to a Railway Company for carriage and those goods are lost, damaged, or destroyed while in the possession and under the control of the railway, the fact of loss, damage or destruction is enough to cast upon the Company the burden of proving that the loss was not due to any negligence on its part. The standard of negligence is given in Ss. 151 and 152, Contract Act, but no general rule universally applicable can be laid down as a rule of law defining the amount and quality of the proof in every case which will discharge the Railway Company's onus. [P 159 C 1]

The general principles deducible from the analysis of leading cases on the subject, however, are :

(i) That where a bailee cannot assign the cause of loss, he may always give evidence to prove, if he can, that, although unknown, the cause must have been external to himself and beyond his control ;

(ii) failing that, to exonerate himself he would have to prove that, while unknown and in all probability attributable to himself, the cause was of such a nature that he could not have foreseen and prevented it by taking all reasonable care and precautions. [P 162 C 1]

*(b) Railways Act, S. 76—Railway Company sued for destruction of cotton goods—Court must be satisfied that in transit proper precautions in packing and manage-

(5) [1849] 13 Q. B. 945=18 L. J. Q. B. 306=13 Jur. 915=116 E.R. 1524=78 R.R. 564.

(6) [1874] Ir. Rep. 8 O. L. 224.

(7) [1857] 26 L. J. Ex. 122=1 H. N. 744=3 Jur. (n.s.) 842=5 W. R. 229=28 L. T. (O.S.) 291=108 R. R. 804.

(8) [1856] 5 El. & Bl. 802=25 L. J. Q. B. 107=2 Jur. (n.s.) 230=4 W. R. 201=119 E. R. 680=26 L. T. (O.S.) 214=103 R. R. 753.

(9) [1907] 5 Bom. L. R. 264.

ment of machines near the goods were taken—Contract Act, S. 151.

Where a Railway Company is sued for destruction of cotton goods by fire, before it can be exonerated, it has to satisfy the Court that, while the goods when in transit and under their exclusive control, it took every proper precaution, not only in the packing of the goods but in the management of their numerous dangerous and unruly machines happening to come into close proximity with the goods, to have rendered any mishap of this kind impossible but for the intervention of some wholly novel and unpreventable factor which they could not with reason have been called upon to anticipate and guard against. [P 167 C 2]

Inverarity, Raikes and Captain—for Plaintiffs.

Binning, Strangman and Jardine—for Defendants.

Jugdmnt.—The material facts about which there is little, if any, dispute are that the defendant Company received from the plaintiffs 186 bales of full-pressed cotton for conveyance from Ujjain to Colaba. The goods were to be carried at railway risk. They appear to have been loaded on a bogie open truck forty-five feet long by nine feet wide, inside measurements, between 14th and 16th April at Ujjain. During that time, though there is no specific evidence on the point, it may be taken for granted that a considerable number of trains passed. Three lines converge on Ujjain, the defendant Company's lines, the G. I. P. Railway and the R. M. Railway. But the general control of the station is in the hands of the defendant Company. The waggon No. 13024, duly loaded with these 186 bales, was finally despatched from Ujjain between 5 and 6 p. m. of 16th April, being the 42nd waggon on the 62 uptrain, which consisted of 59 waggons and the guard's van. The contention of the defendant Company is that the waggon was properly and carefully loaded at Ujjain, that none of the coolies employed in loading it smoked in its vicinity, that there were notices prohibiting smoking, in English and vernacular, that the waggon itself was examined and found not to be in any way defective, that the load was properly sheeted with three fire and water and rat proof sheets, the measurements of which are twenty-five by seventeen-and-a-half, and that the sheeting was roped and sealed and that all these precautions were verified more than once by the clerk in charge of that business at Ujjain. The train started

and, like nearly every other train running that night on this section of the line, was considerably behind time. The traffic was greatly congested, and there was great lack of water between Bangrode and Rutlam. At a station called Nagda the 72-up was stopped and a down-mixed brought up alongside it. The engine of that train must have been close to the 62-up, though the evidence in this case is that it was at some distance from waggon 13024. That engine went to water, that is to say, must, before the trains parted, have passed some part of 72-up at least three times and at very close range. No fire was however detected and the 72-up proceeded to Bangrode which it reached between 11 and 12 p. m. on the 16th. Here, owing to the congestion of the traffic, it received orders from Rutlam not to proceed. The engine was needed to carry off the traffic which had accumulated in Rutlam; and the Bangrode station officials were ordered to stable this great train, consisting of 59 loaded waggons, at Bangrode.

We may assume that if the waggons were loaded with merchandise averaging even only a quarter of the value of that packed in waggon 13024, the total value of this load would have been very considerable. I mention this in connexion with one of many arguments which may have to be noticed later, namely that it would be unreasonable to expect the defendant Company to maintain any fire quenching apparatus at a small inconsiderable station like Bangrode, the average daily takings of which were from Rupees 5 to 10 a day. Bangrode is a small station, but it is clear that it is used as a supplementary stabling station to Rutlam when the accommodation of the latter is exhausted, and therefore may, at any time, be required to shelter goods of great value. On receipt of these orders the 72-up was broken into two parts, one part consisting of 15 waggons being stabled in the dead end siding, the other consisting of the remainder of the train being stabled in the refuge siding. The shunting operations occupied from half to three-quarters of an hour, and during that time no signs of fire were noticed. It will be noted that as soon as the first 15 waggons had been subtracted from the train, the engine,

if it had completed the shunting from the rear, would have been the guard's van and 17 waggons off the burnt truck and if from the other end 27 waggons off it. In neither case would it have been within a distance which, in the opinion of the heads of the defendant-railway, is dangerous. But presumably in the course of the shunting it must have passed the burnt waggon more than once at fairly close range. When the whole 72-up was thus stabled at Bangrode the engine drew off and waited on the main line at some distance, say roughly 100 yards, from the burnt waggon, with steam up, waiting for permission to proceed to Rutlam. It appears to have stood so for about an hour and a half in all before it got line clear and went off with the engine driver and guard. That was about 1-30 on the morning of the 17th. The actual hours and minutes are of no importance and I am only giving the times approximately.

The Deputy Station Master was on duty during the night and superintended the shunting, but neither he nor anyone else detected any fire. Considering where the engine stood and how long it stood there, and considering that the driver, fireman and guard at any rate were probably awake, it is in the highest degree improbable that the fire which subsequently broke out and consumed all these bales but thirteen could have made much headway at that time, or been visible from without the waggon. The 63-down train from Rutlam reached Bangrode about two hours late, say at 3-30 a. m. on the 17th, and the driver of that train saw smoke rising from wagon 13024 at a distance of about a quarter of a mile from the station. It was a dark night, no moon, and I doubt whether it is possible to see smoke in such circumstances, unless it is slightly incandescent and shows a certain amount of glare or light as well as mere smoke. But the engine driver declares that he did not see any flame or light, only smoke. There is a conflict of evidence (and a great deal too much has been made of it) whether the fire was first seen by the pointsman sent to prepare the points for the incoming 63-down or by the driver of that train, and who first reported it to the Deputy Station Master. In my opinion it makes

not the slightest difference who first saw and who first reported the fact that the waggon was on fire, for it is common ground, and that is all that is important, that the fire was first seen and reported when this 63-down was entering Bangrode at about 3-30 a. m. The engine of the 63-down was at once utilized to isolate the burning waggon, while all available hands were summoned to help in putting out the fire. Unfortunately the only fire-quenching appliances available at Bangrode were six hand-buckets and a watering can. There is a well with a rope, but the water was very low and it is obvious that little could be done with such means to cope with such a fire as had now developed in this waggon load of cotton.

While the waggon was being isolated it appears that three or four men got on the top and managed to dislodge 25 or 26 bales, with their hands and crowbars. Some of these were already on fire. But as the flames rose, the men could no longer stay on the waggon, and these attempts at salvage had to be abandoned. But if it be true that these men were able not only to mount the waggon but actually to work on it for some time (and something of the kind must certainly have been done) it follows that the fire could not at that time have seized the whole length of the waggon and probably was confined, as alleged by the defendant Company's witnesses, on the point to the centre portion. There is some ambiguity on this point, the witnesses, or some of them, probably meaning by "the middle" of the waggon, not the middle portion of the surface, but the centre of the land. The latter statement could hardly be correct if the Company's other evidence as to the complete and effective sheeting of the waggon be true. For it would then have been impossible to see into the centre of the waggon at all, and no fire would have been visible until the flames had burst through the sheeting. Nor is it probable that this would first have occurred at the side, although I suppose it is possible that it might have done. On the question of sheeting the defendant Company contends that this waggon was sheeted with three sheets, while the plaintiff's case is that it was only

sheeted with two. The third sheet is not traceable. The sheeting record book of Ujjain has disappeared. In fact it does not appear to have been kept during the first half of April as the local staff was overworked and unable to fill in all the required records. The evidence, so far as Ujjain is concerned, upon this point is purely general. None of the witnesses can pretend to have any definite recollection of this particular waggon, or how it was loaded, or sheeted or sealed. All that that part of the evidence amounts to is that the usual practice is to load sheet and seal in a particular way and that no waggon loaded, as this waggon was, would have been allowed to proceed had it not been so loaded, sheeted and sealed. That is, of course, merely begging the question, and all such evidence appears to me to be quite valueless and negligible. But at Bangrode we have the evidence of the staff to the effect that the waggon had three sheets on it, of which the middle sheet was totally consumed, not a rag or vestige of it remaining. Considering that neither of the other two were much burnt that appears to me almost incredible. Of course, there are different ways of spreading three sheets of these dimensions over a waggon 45 by nine and loaded to a height of say five feet. But Mr. Pechey's evidence suggested that the third sheet would be used under the other two, and there is other evidence in the case to the same effect, namely, that underneath sheets are first put over the goods and then sheets over these again.

Now if that had been the method of loading here, I mean if the third sheet had been put over the central 25 feet of the waggon, dropping down say four feet over each side, and then the other two sheets had been placed over it so as to overlap say 10 feet on either side leaving a drop for each of five feet over each end of the waggon (and that seems the natural way to employ three sheets of these dimensions upon a load placed in a waggon of the dimensions of 13024), then it is obvious that that central sheet could not possibly have been so utterly destroyed without doing a very great deal more damage to the overlapping sheets on either side than the evidence shows was done to them. And I see nothing inconsistent

with Mr. Pechey's ideas of efficient sheeting in supposing that two sheets would have fulfilled all the requirements of such efficient sheeting. Two sheets 25 feet long by 17½ would, of course, have covered the waggon from end to end with a drop of two and a half feet at each end and about four feet over the sides, thus having three feet of cotton bales exposed at each end and about one foot at the sides. Mr. Pechey says that he is not much concerned with the sides of such loads, as the chief care of the Company is to protect the surface. But recollecting the manner in which engines come close alongside goods waggons, as one train passes another at a station, I confess I do not see why there is greater risk of conflagration on the surface than at the sides from sparks. But as I shall show later I do not think that this point is really important enough to deserve a 20th part of the time and labour that has been spent over it during the trial. The fire having been discovered at 3-30 a.m. it appears that the Deputy Station Master at once awoke the Station Master of Bangrode and, as I have said, everything that could be done was done to extinguish the fire. Somewhere between four and five a telephone message was sent to Rutlam for help, and this was received by the Station Master himself who happened to have come on to the station premises a good deal before his usual hours of duty.

The Bangrode staff wanted more water; but Rutlam had no water to spare. There is a water train of 18 tanks which runs sometimes once, sometimes twice, a day out of Rutlam to a small watering station called Ghatla to just half way between Rutlam and Bangrode, that is to say, three miles from either, and brings back its tanks filled to supply the water needs of Rutlam. Rutlam is an engine-changing station, and, of course, if its water-supply runs out, traffic is at a standstill. I cannot in this sketch of the facts go into all the considerations pro and con which weighed with the Rutlam authorities, or have been suggested in argument as being such as ought to have weighed with them, on the subject of sending the water train, immediately the telephone message was received,

to Ghatla to fill and go straight on to Bangrode. Had this been done, had it been feasible, and the staff at Rutlam are unanimous in saying that in all the circumstances it was not feasible, the water train might have got to Bangrode by about 6-30 a. m. And as far as I can see having got there, it would have been quite useless. An immense amount of time has been spent by the plaintiffs over this point of the water train, probably as a consequence of the result of *Lakhichand's* case (1). But the short answer to all this argument is that supposing there had been no difficulties in the way of dispatching the water train, and supposing it had been dispatched and ranged up alongside (or as near as it could then get) to the burning waggon, what would have been the use? By 6-30 the flames must have been at their height: probably no one could have got within fifteen feet of the waggon (vide Storrer's evidence as to the state of affairs when he reached Bangrode, say a couple of hours later) and with tanks and tanks of water available no impression, as far as I can see, could have been made on the fire by tossing buckets of water at it from a distance of fifteen feet. What was needed, what alone would have been serviceable, was not only water in abundance but a hose and pressure pump as well, and there was no available hose or pressure pump at Rutlam, or at any place nearer than Godhra, 115 miles away.

I may have to discuss this part of the case in a little more detail later, though I have long ago felt convinced that it really has little or no materiality if it can even be said to be relevant. For the present it is enough to say that the Station Master of Rutlam did not send the water train but ordered the Bangrode Station Master to take the drinking water tank off the up train which, would reach Bangrode about 10 or 11 a. m. In the meantime the Kotah special had proceeded from Rutlam and found the waggon blazing at Bangrode. That would have been between 6 and 7 a. m. The engine driver gave all the water he could spare from his tender, but this was useless so he took his train on. Then followed the 17-down mixed, with Mr. Storrer on it. No mention appears to have been made of the

fire at Bangrode to anyone on either of these trains except the guard of the latter, who says (in opposition to all the rest of the evidence on this point) that it was common knowledge at Rutlam before his train left. When the 17-down got to Bangrode between 8 and 9 a. m. the engine was taken as close as it could get to the burning waggon and steam was blown upon it, seemingly more to enable the mixed train to get by than with any hope of putting out the fire. Then the 17-down went on its way leaving the waggon burning as hard as ever. In the meantime two telegrams appear to have been sent from Bangrode, one the formal, "to all concerned", and the other, sent later, a special telegram to the Station Master at Rutlam for more water.

The all concerned telegram certainly suggests that the fire had done its work completely and that there was no hope of saving anything. But the other telegram asks for more water, and this appears to have reached the Station Master shortly after 8 a. m. He thought the best thing to be done, indeed the only thing to be done, in the circumstances was to order the Station Master at Bangrode to arrest the drinking water tank which would shortly come to his station; and this was duly done about 10 or 11 a. m. But when its whole contents had, like the spare water of three previous engine tenders, been thrown at the waggon out of the six hand buckets and watering can, naturally without the least effect, the staff at Bangrode gave the fire up as hopeless, and left the waggon to burn itself out. This it did in about two days from the commencement of the fire. Of the 26 bales which had been flung from the top of the waggon when the fire was first discovered, 13 appear to have been saved the remaining 13 which were left lying about already on fire were burnt and utterly destroyed. As to that the position of the Company might be different, had its liability to be determined solely with reference to the manner in which it discharged its obligations not only in the way of taking precautions against risks, but in dealing with the situation when in spite of those precautions the risks had actually occurred. For it is hard to see how, had any attention been paid to these smouldering bales lying

(1) [1912] 14 I. C. 793=37 Bom. 1.

on the ground, a few buckets of water thrown over them at once would not have finally put them out, and saved them, subject, of course, to whatever damage they might have suffered before being dislodged from the waggon top.

Those being in outline the principal facts, what are the legal rights and liabilities of the parties? I do not see that Ss. 72 and 76 of Act 9 of 1890 put a Railway Company sued in respect of goods entrusted to it for carriage in a better position than a common carrier under the old Carriers Act. Nor do I think it necessary to go minutely into any change which the Act of 1890 may have made in the liability of Railway Companies, when sued as bailees, as compared with their liabilities before the passing of that Act. For, as it stands, the law appears to be clear. When anyone has entrusted goods to a Railway Company for carriage and those goods are lost, damaged or destroyed while in the possession and under the control of the railway, the fact of the loss, damage or destruction is enough to cast upon the company the burden of proving that that loss was not due to any negligence on its part. The standard of negligence is given in Ss. 151 and 152, Contract Act, but no general rule universally applicable can, I think, be laid down as a rule of law defining the amount and quality of the proof in every case which will discharge the Railway Company's onus.

It cannot be a rule of law though, speaking generally, I think it is a very sound rule of right reason, subject to all proper exceptions in special cases, that where the fact of loss, damage or destruction is proved, and the Railway Company cannot prove the cause of this loss, etc., it cannot logically prove that it is not in law itself responsible for that unascertained cause. While on the one hand it is fair argument to say that a bailee who has goods in his sole possession and under his sole control and loses or allows them to be damaged or destroyed, must show first how the loss or damage was occasioned before he can be heard to say that it is going too far in the other direction to maintain that it is a universal rule of law in such cases that where the bailee is unable to assign the true cause

of the loss or destruction he must in every case be liable for the value of the goods to the bailor. In every case it is open to the bailee to satisfy the Court, if he can, that although he does not know how the goods came to be lost, damaged or destroyed it certainly was not owing to any want of ordinary care on his part. And this was actually done in the recent case of *Lakhichand v. G. I. P. Railway Company* (1). There the defendant Company could assign no cause for the fire, but the trial Court was satisfied that whatever the cause might have been it was not due to the negligence of the defendant Company, and in this view the Court of appeal concurred. The defendant Company in this case has from the first relied, in my opinion, much too confidently on *Lakhichand's* case (1) as establishing a rule of law that a defendant Company if sued, as this defendant Company is sued, may exonerate itself by proof of general care in dealing with large quantities of similar goods and proving that that amount of care is usually sufficient to prevent loss, damage or destruction.

On the other hand, the case is certainly an authority for the proposition that a decree ought not to be given against a Railway Company sued as bailee for loss, damage or destruction of goods bailed to it the moment it admits that it is unable to assign the vera causa of the loss.

Now what is the actual position at the outset of the case? The defendant Company has received goods to be carried at its own risk. Instead of delivering them, it allows them while in its sole possession and under its sole control to be burnt. Two main questions then arise: (1) Has the defendant Company proved that it took as much care of the goods from the time they came into its possession to the time when they caught fire as an ordinary person would have taken of goods of the like quality and quantity of his own? (2) When the goods were found to be on fire did the defendant Company take as much care of them, that is to say, did it exert itself as strenuously, having regard to the means at its disposal and all the circumstances, to put the fire out and save the goods as an ordinary person might

have been expected to do if the goods had been his own? It will be noted at once that the second question is totally distinct from the first and, in regard to the proof, has to be dealt with on a different line of reasoning altogether. The defendant Company might succeed, as in fact it did succeed in *Lakhichand's* case (1), in exonerating itself so far as the origin of the fire was in question, and yet fail as it did in that case to exonerate itself when the question was of the duty it owed its bailor after the fire had been discovered. And that distinction is also of some importance with reference to Batchelor, J.'s criticism of the judgment of the Privy Council in *The Rivers Steam Navigation Company v. Choutmull Doogur* (2). With respect I am unable to agree wholly either with the line of reasoning or the conclusion reached by Batchelor, J., in that part of his judgment. Presently I will explain more in detail why. Now in this case the defendant Company comes into Court and professes a total ignorance of how the fire was caused.

In effect its case is this. We always take care, as much as any ordinary owner would himself take, of goods committed to our care for carriage. This is proved by the fact that while we carry enormous quantities of cotton, just as this cotton was carried, in open waggons we rarely let it get on fire. Tables have been put in for three years to show that the Company has lost very little cotton in transport by fire. Therefore, it is contended, we must be exonerated in respect of this particular fire. Now I may at once say that that appears to me an entirely fallacious piece of reasoning. Doubtless a very similar course was taken by the defendant-company in *Lakhichand's* case (1) and it proved successful. And the whole defence in this case has been modelled upon the defence in *Lakhichand's* case (1). But it can never follow as a matter of law that what satisfied a Judge in one case with special reference to the facts of that case must always satisfy every other Judge in dealing with cases in which the problem may be in many respects different, the facts either more simple or

more complicated and the ground of inference therefore always liable to change. As to the defendant Company's liability for what happened after the fire was discovered that must always be relatively simple and easy to determine compared with the first question, namely was the defendant Company, in the absence of any known cause, liable for the origin of the fire? And it is clear that if that question be answered in the affirmative the second question would lose all practical importance. Now let me explain in a word or two why I think the very simple reasoning upon which the defendant Company mainly relies, professing to borrow it bodily from *Lakhichand's* case (1), is fallacious.

Assuming that the defendant Company has carried say 600,000 bales of full-pressed cotton, in all respects like the full pressed cotton which was burnt in waggon No. 13024, and carried them safely with no grater percentage of loss than say 250 bales out of 600,000, how is that an answer to the fact that these particular 186 bales were set on fire while being carried by the defendant Company. Surely it is rather worse than no answer. For again assuming that exactly the same precautions were taken with these bales as with all other bales, and that in the vast majority of cases the bales reach their destination safely, does it not follow of necessity that since in fact these bales were burnt, the Company must have exposed them to some extraordinary danger? Upon the defendant Company's reasoning it is certain that one of two things must have happened, assuming that their propositions be true. Either the ordinary precautions were not adopted in loading these bales, or they were exposed to extraordinary danger. In either case if the act was the Company's—a point I will develop in a moment—it appears to me to follow that on the facts thus stated and admitted, to go no further, there is a clear case of negligence made out. I cannot myself see how evidence that as a rule bales are carefully loaded and in consequence reach their destination safely, can really have any relevance in the defendants' favour, although, no doubt, once believed, that kind of proof would acquire a distinct cogency against the defen-

(2) [1899] 26 Cal. 998=26 I. A. 1=3 C. W. N. 145 (P.C.).

dant company as making it certain or almost certain (in the absence of any known or even suggested cause external to the company and its servants and machinery) that these particular bales were not treated with that degree of ordinary caution all along the route which has ensured the safe delivery of so many thousand other bales. I have read a great many cases, to which I have been referred, and carefully analyzed their contents, and I have very little doubt about what is the law in cases of this kind.

The company as bailee is primarily liable for the loss, but it may exonerate itself in two ways. It may, while ignorant of the cause of the fire, show, if it can, that that cause could not possibly be attributable to itself, that in other words, it was altogether external and beyond the company's control. I should always feel that there was a logical difficulty in accepting such a demonstration in a case like that with which I am dealing. But in cases of loss, it might very well be that the bailee might show that he had taken all reasonable care of the goods and yet that some person unknown had stolen them, and so they had disappeared. Here in a sense the cause of the loss is unascertainable and yet the bailee might exonerate himself. But that could only be by satisfying the Court that the cause of the loss was external to himself and beyond his control. The commonest case perhaps would be spontaneous combustion if that ever really happens.

But that again is not truly a case of an unknown cause, for once assigned and believed it is a complete and efficient cause and explanation. But the unknown felonious acts of others (which according to high authority ought never to be assumed), again narrowing the ground of this particular species of defence, or acts of others in no sense felonious but merely careless and guessed at as a cause, almost exhaust the category of unassigned causation external to the defendant company itself which would be likely to be acceptable in a Court as a sufficient possibility, and when consistent with the proof of ordinary care, probability, to exonerate the bailee. Second, the bailee while ignorant of the vera causa might point to the fact that he had taken such precautions

against risk, had dealt with the goods entrusted to him with such care, that whatever the cause might be, and although attributable to his own act, yet it must be presumed to have been of such an uncommon, or of such an unpreventible, kind that he ought not to be held responsible for it. But such a defence could, I apprehend, only be logically (if ever logically) established by the virtual exclusion of all causes of an ordinary kind attributable to the bailee or his servants or machinery.

But I should think that it would be extremely hard for a defendant to make good such a defence, although, no doubt, it has been done. Those cases must, I think, be very rare in which a bailee, having the sole custody and control of goods and losing or destroying them without himself knowing the cause, would be able to satisfy a Court that whatever the cause was it must have been attributable either to some agency external to his own and beyond his control or to some thing so unusual and unpreventable that he could not in reason have been expected to guard against it. And that in effect is the law laid down, as I understand it, in *Rivers Steam Navigation Co. v. Choutmull Doogar* (2). Lord Morris is very careful throughout his judgment to insist upon the need of such evidence as he examined on this point showing that the fire was caused by something or somebody external to the defendant company and beyond its control. His reasoning on that part of the case, which should not be confused with his reasoning upon the second part, namely whether apart from the origin of the fire the company was liable for negligence in not having detected it sooner, may, I think, fairly be thus summarized. The defendant company had these goods in their exclusive possession and control. They allowed them to get on fire and can assign no cause whatever external to themselves and their agents, nor can lay any solid foundation for the inference that the vera causa of the fire might have to be sought there, (his Lordship's examination of the evidence does not seem to me to have gone beyond this upon that part of the case) therefore they are liable. In other words, having regard to the natural course of events and the admitted facts, the fire must have been caused by some

act or neglect of the defendant company: since it undoubtedly was caused, since a fire is not an ordinary event to be set down as a usual incident of transport, and since no one else, so far as the evidence on that point goes, could reasonably be held to have caused it, the defendants and no one else are answerable for the fire and were the cause of it.

This does, of course, go very near laying down as a rule of law that where the bailee has the complete and sole control of the goods bailed, loses or destroys them and cannot prove the cause, the legal inference is irresistible that the cause is attributable to him and that, looking to the result, it must have been due to negligence. For fires are not caused except by negligence, though what the degree of that negligence may be would often depend upon all the facts being known, the true cause ascertainable. It would, I apprehend, have been no answer to the plaintiff's case in *Choutmul Doogar v. Rivers Steam Navigation Co.* (3), in the opinion of the Privy Council, had the defendant company proved that it had carried 1,000 of loads of jute under similar conditions without losing a drum by fire.

From this brief analysis I deduce the following general principle, that where a bailee cannot assign the cause of loss he may always give evidence to prove, if he can, that although unknown, the cause must have been external to himself and beyond his control. Failing that, to exonerate himself he would have to prove that while unknown and in all probability attributable to himself, the cause was of such a nature that he could not have foreseen and prevented it by taking all reasonable care and precautions. Thus, of course, it will always be open to a bailee defendant to give evidence, although he has no hope of discovering the cause of the loss, to prove that it was beyond his control, and that he is not answerable for it. While such evidence would always be relevant and need to be examined, should it fail of its purpose, the mere fact that it was relevant and examined would not materially detract from the ordinary presumption of right reason that a man who has had the sole custody of goods and has destroyed them without knowing how, is himself res-

ponsible for the destruction. Such, I understand, was the view of Pallas, C. B., in *Flannery v. Waterford and Limerick Railway Company* (4), a judgment in which the nice points arising in all cases of the kind are treated with a subtlety and thoroughness that, I think, is rarely to be found in the judgments of the English Courts. Such too, I think, was the opinion of Erle, C. J., in *Scott v. Uxbridge and Rickmansworth Railway Company* (5) and the same doctrine was expressed in a sentence by Scrutton, J., in a very recent case, *Hurlstone v. London Electric Railway Co.* (6).

What is the evidence in this case? An immense amount has been accumulated, but I may say at the outset that, in my opinion, at least 90 per cent. of it will never be relied on, or even looked at again during the much too protracted trial. I repeatedly protested, but both sides appeared to be equally desirous of heaping up evidence, apparently with the idea of making the case appear to be much more difficult and complicated than, in my opinion, it really is. A common reply was that days were spent over a similar point before Robertson, J. or Heaton, J.; and it looks as though the Bar had accepted a standard pattern (and I think a very bad standard pattern) for all cases of the kind. But where both sides are rich and money appears to be no more an object than time, naturally neither side likes to yield to the other in a plausible desire to lay every possible fact, material or immaterial, before the Court. Proof, if any were needed of the almost ridiculous superfluity of evidence in this case, is given by the simple fact that in their final addresses counsel on both sides hardly referred to the evidence at all. Mr. Binning for the defendant company occupied about an hour and a half dealing almost entirely with generalities, with an occasional digression of which the object was to defend one of his witnesses from what he thought unjustifiably severe strictures, while Mr. Inverarity took perhaps an hour longer, but devoted almost all that

(4) [1877] Ir. R. 11 C. L. 30.

(5) [1866] 35 L. J. C. P. 293=1 C. P. 596=12 Jur. (n.s.) 602=13 L. T. 596=14 W. R. 893.

(6) [1913] 29 T. L. R. 514.

(3) [1897] 24 Cal. 786=1 C. W. N. 200.

time to a discussion of the law and English cases illustrating his main points.

The evidence, such as it is, breaks up naturally into three main divisions: (1) The evidence of the Ujjain witnesses intended to prove that all proper care was taken of the goods while loading, and that when loaded they were sheeted in the ordinary way, roped and sealed. That nothing was wrong with the waggon itself, and that therefore, up to that point the defendant company could not possibly be held guilty of any negligence; (2) the evidence relating to the journey between Ujjain and Bangrode; (3) the evidence relating to Bangrode, which again was to be subdivided into evidence relating to what happened before, and after the fire was discovered. The latter evidence includes all the Rutlam witnesses and the drivers, firemen, guards, etc., as well as the passenger Storrer on the train which left Rutlam and reached Bangrode after the fire had been discovered. This evidence also includes the train which brought the water tank, of which use was finally made, from Nagda.

Now a very little thought will show that most of this evidence must be valueless. Indeed, in spite of the length at which witnesses were examined and cross-examined, hardly a single fact which can help the Court is really disputed. Thus, for example, it is, of course, useful to know what trains passed the 62-up on its way between Ujjain and Bangrode, and how long the foreman was in close proximity with any or all the latter. But such facts could have been elicited without dispute in five minutes from any of the defendant Company's responsible servants. On the other hand the evidence is not explicit as to what trains passed the waggon, or at what distance while it was being loaded at Ujjain. And I shall presently have to point out that the want of this information might tell seriously (though as the facts stand I do not think it does) against the defendant company. Before I demonstrate, as I hope to do conclusively in a little while, that I have not exaggerated the worthlessness of most of the evidence, I will point out that the origin of the fire admits of only three practical possibilities: (1) that it was caused while

the waggon was being loaded or after being loaded was awaiting dispatch at Ujjain; (2) on the journey between Ujjain and Bangrode; (3) at Bangrode between the time of its arrival there at about 11-44 p. m. and 3-30 a. m. It is only the first of these three possibilities which offers the defendant company any chance of satisfying the Court that the origin of the fire was not due to any act of theirs. For after the train, with this waggon making part of it, started for Bangrode, it cannot be contended that if the fire was caused by any act at all, and not due to spontaneous combustion, that act was not the act of the defendant company or some of its servants. My opening analysis of the true content of the main propositions upon which this doctrine depends, as well as of the true content of that doctrine applied to any particular case, brings out clearly, I hope, the great importance of this factor in the reasoning. For if the act cannot possibly have been an act external to the defendant company, that is to say, if it is not humanly speaking possible that anyone but the defendant company itself caused the fire, then the further fact that the defendant company is not in a position to show what the act was, who did it, or under what conditions it was done, virtually deprives all general evidence of ordinary care taken in this, as in innumerable other cases of like goods in quality and quantity, of all probative, or at any rate logical, value. The furthest such evidence could go in such circumstances would be to open a possibility of the origin of the fire having been due to some cause so extraordinary and unusual (the intentional felonious acts of any person being now entirely excluded since such are never to be presumed) that although in a sense the defendant's own act, the defendant could not be charged with liability in respect of it. Virtually the only real exception to this rule, I think, would be a true case of spontaneous combustion, a cause which is as truly external to the defendant company as though the waggon had been set on fire by a passing engine belonging to some other company, or by a flash of lightning.

But in this case the defence of spontaneous combustion was explicitly abandoned before the trial. At the close

of the case Mr. Binning urged that while this was so, the defendant company never meant to say that the fire may not after all have been a case of spontaneous combustion; all that the defendant company meant was that they were not in a position to prove this and did not mean to try. But I think after the correspondence which passed on the point it would be wrong for the Court to entertain that cause as even a possibility. For the plaintiff had expressed his intention of calling expert evidence to convince the Court that these bales could not have set fire of themselves, had that defence been directly, even indirectly, persisted in. I must therefore deal with the evidence on the assumption that whatever the cause of the fire really was, it was not spontaneous combustion. And I may add that I do not believe that full pressed bales of cotton ever would ignite in that way. I do not know whether a single case has ever been scientifically proved, by which I mean that every other possible and ordinary cause, such as smoking in the vicinity, sparks, etc., has been rigorously excluded.

There may be many cases, both on railway lines and in godowns, where large quantities of cotton have been burnt and no cause has been discoverable. Some of these may have been attributed to spontaneous combustion. But had all the facts been known, as they never are in such cases, a simpler and more natural cause would probably have been discovered. For it must be admitted that the consensus of scientific opinion, while favouring the bare possibility is strongly against the probability of the occurrence of spontaneous combustion in pressed cotton. If such a cause is always to be regarded as extremely remote and unlikely, although just possible, it is hardly necessary to seek for it among a dozen quite ordinary, probable and natural causes. Here, for instance, the burnt bales have been exposed over and over again to contact with passing sparks, and even if we exclude chance kindling from careless smoking while the bales were being loaded there are enough probable, not to say possible, causes of a very ordinary kind to render it unreasonable to go out of our way (as some members

of the defendant railway staff appear to have done in the early correspondence) to ascribe the fire to such a very exceptional and questionable cause as spontaneous combustion.

It has never been suggested, I think, in this case that the cause of the fire may have been due to the friction of the iron hoops round the bales. This was put forward and, I believe, seriously considered in the former case. But standing alone it can hardly be regarded even as a possible cause. I am pretty positive myself, that without some added factor, some defect in the waggon bringing some of its parts while in motion in contact and violent contact with these hoops, no amount of ordinary friction in transport could suffice to generate a fire. Were that really so it must be a matter of averagely frequent recurrence, and having regard to the millions of pressed bales of cotton which are annually carried over hundreds and hundreds of miles of railway without a single case of this kind ever having been proved to occur, I think I may safely disregard this conjectural cause. I have laboured these two points more than I should otherwise have been disposed to do because the whole of my reasoning must ultimately depend upon a logical process of exclusion. I have to exclude all possible causes external to the defendant company before I bring the problem into a narrowed focus, within which the application of what I conceive to be not only the governing principles of law, but of right reasoning, can be easily and clearly applied. I will now turn back to the Ujjain evidence which was quite unnecessarily voluminous. I think it is entirely negligible for this main reason that on the admitted facts, I do not believe that the fire did or could have originated at Ujjain. It will be observed that from the first, and in some parts of the oral evidence at the trial, the defendant company attempted to show that the fire when first seen was in the middle, meaning the heart of the waggon. Of course, if that were so, its cause could not have been external ignition in transit, either at Nagda or at Bangrode. Some of the lowest or lower tiers of bales must have been set on fire at Ujjain while the waggon was being loaded, and the

others being heaped upon them and the whole load sheeted down, the fire must have slowly smouldered from 14th April, when the waggon appears to have come in from Rutlam—or I should perhaps rather say from the moment it began to be loaded in Ujjain—up to 3-30 a. m. on 17th, when the flames were seen at Bangrode.

Now books of authority certainly do say that cotton may smoulder almost indefinitely once ignition has thus been partially started, and it is not absolutely impossible that sparks of some sort may have fallen upon and lodged among the lower or middle tiers of bales while the waggon was being loaded at Ujjain. But I should think that ordinarily, if such a thing happened, the almost immediate superimposition of other bales would have a very strong tendency to crush out a merely smouldering spark on the surface of the bale below. And although if the smouldering cotton were stationary, it may be that the process of ignition is sometimes extremely slow, this must be less likely to be the case where smouldering cotton is being dragged through the open air at a fairly high rate of speed. Although sheeted, a waggon like this would admittedly have had a foot or so of the lower part of the load exposed to the air, and if the origin of the fire had been as suggested by the defendant company something which happened at Ujjain (I mean something beyond their own control) beginning in the lowest or lower and middle tiers, then it appears to me hardly possible that the fire should have remained unnoticed, merely smouldering, from say 15th April to the early morning of 17th. The fanning wind made by the moving train would have been just about the level where the fire was, on this theory, originating, and surely long before the train had completed its journey to Bangrode, the smouldering centres would have broken out into flame. That is one reason, though it may not be deemed conclusive, for dismissing the whole Ujjain evidence. For, if the fire did not originate in Ujjain, it appears to me perfectly useless and bad reasoning to pile up evidence of careful loading at that place. However careful the loading, it was not careful enough. Either it was not careful, or

the waggon was later exposed to heightened and unnecessary risk else there had been no fire. That I should have thought self-evident. And in this connexion I will pause upon Mr. Binning's concluding presentation of his case. That learned counsel was evidently as alive as I am to the rather absurdly disproportionate amount of evidence he had laid before the Court, for no better reason that I can see than that this had been done before in other Courts and was the approved way of conducting a Railway Company's defence. For he virtually gave the go-by to the whole of his evidence, resting his case on a syllogism and a very bad syllogism. He said in effect that the sum of the whole matter was this, the kernel lying in certain statistical statements put in by Mr. Pechey: The defendant company carries enormous numbers of bales every year. We have shown by these tables that relatively very few get burnt. Therefore it follows inevitably that we take ordinary and reasonable care of all goods that are entrusted to us for carriage. The staring fallacy lies in the conclusion and the use of the word "all." The true syllogism is this. We carry innumerable bales every year loaded with ordinary care and upon a uniform principle. None of these bales get burnt. These (and a few rare cases to be found in our tables are of the same nature) did get burnt. Therefore it is clear that either our ordinary usual precautions were not taken with these bales, or that something very unusual happened which rendered precautions ordinarily sufficient insufficient in the case of these bales. Now what was that? Here the defendant company is silent, merely saying that we do not know, we have not the slightest idea. But whatever it was it was not our fault.

But another and more cogent reason for disregarding the whole Ujjain evidence is that upon examination it turns out that none of the witnesses who give it really has or possibly could have definite recollection of this particular waggon. All they can say (the superior officers from such records as are kept) is that waggons are always loaded and sheeted and sealed in a particular way, and that as there is nothing on record to show that there was any defect in

the construction of this waggon, or anything wrong in the way it was loaded, and as it was allowed to start on the evening of 16th April, it must have been etc., etc. Vinayak Vaman, for instance, says that he examined the waggon three-quarters of an hour before it left, but here he can only be speaking of his general practice, just as he is when he says that had bales been projecting he would not have allowed the waggon to go. Every one acquainted with the ways of station staffs up-country will easily rate such evidence at its true value.

We have a photograph put in by the defendant-company of an ideally sheeted waggon, which makes it appear as though the whole load were completely swathed in sheeting, and then we have half a dozen photos put in by the plaintiff of waggons belonging to the defendant-company in which the load appears to be bulging out and is certainly considerably exposed. Except as showing that the perfect ideal of loading offered to the Court by the defendant-company is, to say no more, sometimes departed from, I do not attach much value to these pictures. Nor do they seem to be necessary, for two main reasons. One is the evidence of Mr. Pechey which makes it quite clear that not much concern is shown in loading waggons for the lower part of the side of the load. This must in almost every case of a fully loaded open truck, if Mr. Pechey is right, be exposed. And the next and far more decisive reason is that the evidence of two chemical analysers in this case proves conclusively that these very sheets, which are intended to protect the cotton against fire, are themselves rather more inflammable than cotton itself. If they afford any additional protection against ordinary sparkage at all, it must be rather on account of their surface than texture. Very likely a passing spark would have less chance of finding a dangerous resting place upon the surface of one of these sheets than upon the centre of an uncovered set of pressed bales. But not much more can be said in favour of the sheets as a protection against fire. If they are at all loose and wrinkled on the top of the bales, thus forming ridges, as in Captain Higham's experiment, it appears that they would offer a comfort-

able and secure lodgment to a dangerous spark and would be almost certain, if then set in motion, to break out into flame. They appear to be saturated with a fatty substance, the main object of their manufacture being apparently to make them water, and not fire proof. This waggon was in process of being loaded at Ujjain from the 15th to the evening of the 16th when it was sent off on 62-up train to Bangrode. All the coolies available have been called and unanimously declare not only that they never smoke themselves, but that they don't know what bidis and hukkas are, and that some of them have never even heard of smoking or seen anyone doing it even in the town of Ujjain. This is simply absurd and indicates the true value of most of the Ujjain evidence. But taking it to be true, it excludes one very simple cause of the fire, assuming that the fire could have been caused at all at Ujjain and yet remained undiscovered till 3-30 a. m. at Bangrode. As far as Ujjain is concerned then we should be limited in our search for a cause to some spark thrown on the bales in process of loading by a passing engine not belonging to or under the control of the defendant company, but there is no evidence of anything of the kind, and although engines belonging to other companies do pass through Ujjain, the general control of the traffic and loading there is in the hands of the defendant company and it is just as much their business to see that nothing uncommonly dangerous in the management of engines, which they permit to pass, is done, as it would be were they dealing with their own engines. Now as to the sheeting of the waggon, the Ujjain staff cannot produce their sheeting record.

Apparently they were all so overworked at that time that they were unable to write up records, which in the ordinary course they were bound to keep. And this, I may observe, is worth considering in connexion with the evidence of such witnesses as Jamnadas and Vinayak Vaman. In such circumstances it is easy to understand that they might have relaxed some of their ordinary precautions and the rigour of their rules of inspection. But at any rate we have no evidence worth the name of how many sheets actually were placed over this particular load of 186.

bales. The first report, made by a responsible officer of the company as the result of personal enquiries at Bangrode after the fire, suggests that the staff there were of opinion that only two sheets had been used. Much evidence in this case has been led to prove that three and not two sheets were used. I do not think the point very material for reasons which have already been given. But it appears to me more probable, that only two sheets were used than that the third should have been utterly consumed leaving not a trace behind, while the remaining two were but very slightly burnt. This is barely possible if the fire, when first discovered, was confined to the middle of the truck, which for the purposes of this conjecture may be taken to have been covered by the third sheet. For then the first thing the local staff would have done would have been to pull off the remaining two sheets, while the fire may have got such a hold on the third as to render any attempt to save it useless.

Its inflammable composition would also have contributed to its speedy and total destruction. The length of the waggon is 45 feet, and as I pointed out in an earlier part of this judgment, if three sheets were used in the manner suggested by Mr. Pechey, the central sheet would have been overlapped by the two end sheets to say, the extent of ten feet or so, leaving a space in the middle through which the flames may first have broken. But the point appears to me to be of absolutely no importance, and the extent to which it has been laboured of a piece with the rather senseless determination to accumulate evidence rather than first reason out the content of the problem to be solved, which has characterized the conduct of the parties on both sides. For it is perfectly obvious that three sheets would not necessarily afford complete protection where two failed to do so, although (unless the ignition of the sheets themselves was the true cause of the fire in which case no number would have increased the security of the load but rather heightened the risk) using three would have left rather less of the load exposed than would have been exposed had only two been used. According to Mr. Pechey's idea two sheets would have been quite adequate cover-

ing for such a load as this; the whole of the top of the load would have been covered only about a foot of the lower sides, and two or three feet of the ends of the load would have been exposed. But the fact remains that whether two or three or thirty sheets were used the load caught fire, and there is nothing to show that increasing the number of sheets under certain conditions of danger would have increased the degree of protection.

Let it then be supposed for the rest of the argument that waggon No. 13024 left Ujjain loaded with 186 bales sheeted with either two or three sheets (in my opinion it makes not the slightest difference), duly roped and sealed, waggon in good running order, load so far safe and unignited. Will this state of preliminary facts exonerate the defendant company? They appear to have thought that it would. In my opinion it does not. They have still to account for the manner in which, notwithstanding all these ordinary precautions having been taken, a most unusual thing happened, namely how the waggon came to be on fire at 3-30 the next morning. Their reply would probably be, we have shown that in loading and dispatching the goods we took as much ordinary care as a prudent man would have taken of those goods had they been his own. We are therefore freed of all liability under Ss. 151 and 152, Contract Act. That is a view which I cannot adopt. It appears to me to violate not only well settled law, but all canons of reasoning. Before the defendant company can be exonerated they have yet to satisfy the Court that, while the goods were in transit and under their exclusive control, they took every proper precaution, not only in the packing of the goods, but in the management of their numerous dangerous and unruly machines, happening to come into close proximity with the goods, to have rendered any mishap of this kind impossible but for the intervention of some wholly novel and unpreventible factor, which they could not with reason have been called upon to anticipate and guard against. And on this point the defendant company is utterly silent. Absolutely no evidence has been given of the manner in which they manage their engines when these have to pass close to loads

of valuable merchandise. If they could have proved that they have adopted every means known to science to neutralize the recurrent risk of sparkage, if they had proved that none of their engines were ever allowed to pass, particularly at night, close by loaded waggons containing highly inflammable goods without shutting off steam, and that after every such quite ordinary risk had been run, inspection was taken of the waggon which had been exposed to the danger—and all these appear to be quite ordinary precautions which any man would naturally take to protect his own very valuable property—then the defendant company might fairly have said to the Court, we have now proved that we did everything in reason to take care of these goods and we have no idea how, in spite of having taken all those precautions, the fire occurred. The answer (not to that appeal, which would then be perfectly legitimate, but to the supposed need of ever making it) would be that in such circumstances it is almost impossible that any fire should occur or that the defendant company would be called upon to account for it.

Before I deal with the question of sparkage which, in my opinion, is the most important in the case, if indeed not the only important one, I will say a few words upon another point upon which an entirely disproportionate amount of time and quantity of evidence has been wasted; I mean the manner in which waggons of this kind are loaded. The defendant company stoutly maintain that fully pressed bales loaded in open trucks are always laid end to end within the truck, and then tier on tier till the full tonnage of the waggon is reached. The plaintiff, on the other hand, contends that it is a common practice for the defendant company to load these bales in a very peculiar way. The length of a fully pressed bale is 4'1 and the interior width of one of these waggons is 9 feet. This laid end to end on the floor there would be a space of eight inches between. The plaintiff, however, contends that the bales are commonly made to project anything from six inches to a foot over the rail of the truck. This rail is six inches high. Thus, if the plaintiff be right, the bottom tier of bales would be lying at an angle of about six inches in

thirty-six. This would leave space between for placing a third row of bales upright. The width is 1'8. There is, of course, absolutely no evidence to show that waggon No. 13024 was loaded in this singular manner, but Mr. Inverarity relies on his pictures to show that in some waggons fully pressed bales do appear to be projecting slightly. Mr. Pechey appeared to doubt whether in one instance at any rate the bales were fully pressed, and if they were not, but the common dokdas of unpressed cotton, no inference could be drawn from the appearance of such a load as to exceptional methods of loading fully pressed bales.

Apart from Mr. Inverarity's pictures, which are not very convincing, I should certainly have thought that the method of loading he suggests is so inconvenient and purposeless that no sensible loaders would ever have recourse to it. Every tier would be tilted down to the centre and the whole load would, I should think, be so unstable as to be likely to fall while in transport. But Mr. Inverarity appears to think that the notion is to wedge the two outside tiers by the central row of upright bales so as to fix them more firmly than if they were merely left lying on the floor eight inches apart. I do not think, in the first place, that the plaintiff's point is of any importance. It is true that if the ends of a lot of uncovered bales were projecting with an upward tilt, say, six inches beyond the waggon, and uncovered, they would be much nearer a passing spark and might offer it a more comfortable resting place. But the absurdity of the argument lies in this: that there is absolutely no evidence to prove that this method of loading is universal (and I should think every probability points the other way) or that the particular waggon was loaded in this way. It is going much too far afield to ask the Court first to hold that out of four or five thousand waggons one or two are loaded in this way on the strength of one or two photographs taken of waggons at rest in the Colaba Station (and for all we know partially unloaded or prepared for unloading) and two at rest in Broach and Surat respectively, and then to conclude that this waggon must have been loaded in that way and so exposed to an increased

risk. Had it been so then the evidence pointing to the fire, when first seen, being in the centre of the waggon, would be made more credible. All I can say is that there is no evidence whatever that would warrant me in holding that this waggon was loaded in such a singular manner. I am inclined to agree with Mr. Pechey that no one but a fool would think of so loading an open truck. It is not as though by doing so more goods could be got into the waggon. Loaded in the ordinary manner the full tonnage of the waggon could be easily exhausted without the load being in excess of the prescribed height. But it cannot be denied that the plaintiff's photographs have this degree of value, supposing that they are not explainable or qualifiable on other grounds, that when the defendant company with its picture of a completely sheeted waggon asserts, we invariably load every waggon in this manner, the pictures show that there are exceptional cases in which the defendant company does not. But I do not understand Mr. Pechey to contend that there are not exceptional cases.

There always must be over a great railway system in this country managed, as far as loading operations go at all sorts of out of the way places, by ignorant, careless and idle natives. But where goods catch fire, the case every time must be exceptional and some exceptional feature must have been introduced. Else we should have the proposition, all goods loaded, with ordinary care, according to our usual loading practices, and carried in the ordinary way get burnt, which is absurd. Where they do get burnt these questions arise: What was the exceptional feature which brought about the exceptional result? Was it some act of the defendant company? And, if so, was it some act which they ought not to have done in the exercise of ordinary care and prudence? Whether the exceptional feature, the cause of the fire, lay in the loading of the waggon or in the manner in which the defendant company managed the traffic through which that waggon had to pass, matters nothing. It is here, I think, that the defendant company, perhaps misled by their rather easy success in *Lakshichand's* case (1), have been lulled into a false security.

They appear to have thought throughout the trial that if they could get the Court to believe that this waggon was loaded with ordinary care, they had done all that was needed to absolve themselves. In my opinion it is not so. They are still, in the absence of a definite known cause, to satisfy the Court that in the management of their engines in the whole course of drawing this truck from Ujjain to the place (wherever that was) where it caught fire, they observed in all respects the same degree of care and prudence which an ordinary man conveying his own valuable goods might have been expected to take under the same conditions.

Then how does the evidence stand about this? It is certain that the 62-up was passed at Nagda by another of the defendant company's trains, the engine of which went to water, that is to say, must have twice passed part at least of the train on which the burnt waggon was in performing that operation, and once in ordinarily crossing it, that is, three times in all. The engine must have started to water, and it is at starting that sparks are likely to be emitted more freely, just as they are under any other condition of strain, as for instance going uphill. It is pretty clear from parts of the defendant company's own correspondence that some suspicion attached to this incident, and that it was at once seen to have been a possible—not to say a probable—cause of the fire. The only thing to be said against it is, that the fire was not discovered till some four or five hours later; and if a spark from this engine had set the truck on fire by lodging on the sheeting then, as the train moved from Nagda to Bangrode, it is pretty certain that the wind would have fanned the fire into a blaze and that it could not have escaped detection during the later shunting operations at Bangrode, which occupied about 45 minutes. But it is at least possible that the spark (if it was a spark here which set the waggon on fire) lodged in the lower tiers of the uncovered bales, and worked its way smouldering inwards, till later on it set the whole waggon on fire. However that may be, here is an obvious, a natural and possible cause. And if it were the true cause, could it be said that the defendant company had taken all rea-

sonable care of the goods in train 62-up although they allowed this engine to pass and repass close to the loaded waggon? I doubt it. I am sure that any private owner who had been so situated would at least have taken some precautions to minimize the risk of the engine throwing out sparks, and that he would probably also have been on the watch to see that no spark in spite of such precautions had actually lit on and was likely to set fire to his goods. If the fire had not been caused by the time this train left Nagda, then by a process of exhaustion we reach the conclusion that it must have been caused either by sparks from its own engine on the way to Bangrode after leaving Nagda, or by sparks from its own engine while engaged in shunting it at Bangrode, or afterwards when the whole train having been stabled, the engine stood for an hour and a half on the main line with steam up waiting for line clear to Rutlam. It is unlikely that any spark from the engine of train 62-up could have set a waggon, so far back on the train as this one was, on fire while the train was actually running.

Such evidence as there is on the point, not very convincing evidence at best, points to the extreme improbability, verging on actual impossibility, of a spark travelling the length of 42 waggons. The danger line used to be put at ten waggon lengths but has been reduced in Mr. Pechey's time to seven waggon lengths from the engine. Waggons loaded with inflammable goods are not under the present running rules allowed nearer to the engine than this. But from the very fact that there is a rule on the subject it is clear that the controlling authorities of the defendant company do recognize a real danger from sparks. Nor can there be any serious doubt or controversy but that that danger is real and substantial.

But if any such rule is needed for running trains it is clear that some similar rules ought to be enforced to regulate shunting and the management of engines passing close to loaded trains. No such rules appear to exist. It is idle to protect goods against this very special risk by insisting upon their being drawn at a greater distance than say 150 feet from the engine, if any number of other

engines may pass and repass them at a distance of less than ten feet.

I have been referred to some English decisions upon the liability of a Railway Company for damage caused to adjacent properties, etc., by sparks from their engines. The case decided by Tyndall, C. J., in 1846 shows that much the same question I am now considering was raised there and that the Railway Company relied on much the same defence. But most of these cases differ from the present case in being actions brought by persons between whom and the defendant Railway Company no privity of contract existed. And perhaps the defendant company here would seek to distinguish even what principles can be got out of those cases by pointing to the words of Ss. 151 and 152, Contract Act, and saying that that was the utmost the Railway Company had to prove in any case in which it was charged with loss, damage or destruction of goods as a bailee by a consignor. I think however these cases are not without value as showing the views consistently maintained by many eminent English Judges where it was merely a question of negligence or no negligence. True, these may have been actions on the case, and not, as here, founded in contract, but I cannot see what fair distinction can be drawn between the principles upon which in the former class of cases there was said to be a case to go to the jury for the plaintiff and cases like this in which again all that is to be decided is: whether in the whole ordering and management of the goods entrusted to them including in this, of course, the whole ordering and management of any other part of their machinery or running gear, from which any reasonable danger might be apprehended, the defendant company had or had not exercised ordinary care and prudence. It might be argued that while in most, if not all, of those cases the Judges appear to have insisted with some rigour on the railway companies taking the utmost possible care to prevent their engines causing any injury to the property of other people all that our law requires is that as between the Railway Company and their clients the Railway Company is only bound to take ordinary care. I confess I see no reason in principle why a company

should be, under a greater obligation towards those with whom it has entered into no contract than towards those with whom it has. And as I understand the terms of Ss. 151 and 152, Contract Act, they would not exclude from the reasoning by which the final conclusion is to be reached just those considerations on which so many English Judges have repeatedly laid stress in determining whether a case was proper or not to be left to the jury. I can hardly doubt that in the admitted facts here there is a case which in England would most certainly have been left to a jury, nor do I entertain much doubt as to what the jury's verdict would have been. The defendant company has not offered any evidence to show that its servants have orders to handle their engines with special care when passing stationary loaded waggons, particularly at night. And yet surely it is no extraordinary measure of precaution if their engines ever throw out sparks and glowing cinders at all. This they admittedly do. It is plain, I think, that whatever danger is reasonably to be anticipated from such a cause is greatly increased at night when, as a rule, there are long intervals during which probably no supervision is exercised at all, and at any rate the same degree of vigilance is hardly to be expected as during the daytime. A fire kindled in daytime might be easily and early detected by a hundred casual eyes but during the small hours of the morning, unless the relatively few officers of the company on duty are wide-awake and on the alert, it might go undetected until it had got such a hold as to be beyond all local means available to check it. And this is exactly what did occur in this case. For however the fire originated, it is certain that it was not found out till it had made such headway that the staff at Bangrode found it impossible to cope with.

Some evidence was offered to show that the type of engine used to draw the 62-up is fitted with an internal arrangement—a brick arch and baffle plates—to reduce the quantity and size of sparks admitted to the funnel. But no one on behalf of the defendant company can seriously contend that these, as well as all the rest

of its engines, do not occasionally emit dangerous sparks and glowing embers. The defendant company has adopted no spark arrester, although we are told that the G. I. P. uses one on all its engines. It is true that no spark arresters yet invented are, in the opinion of such experts as have been examined in this case, thoroughly satisfactory. But the fact that they are used on the G. I. P. and at least two Scotch lines of railway, suggests that such as they are they are better than nothing. But the real point lies, I think, not so much in the extent to which precautions of that kind are carried, for in no event it is contended that they are always efficient, but rather in the degree of caution shown by the defendant company in the management of its engines, it being admitted and universally known that they do constitute a danger to inflammable goods when close to them while passing and repassing trains so loaded. And this appears to me in the admitted facts of this case to be the vulnerable point in the defence.

In the case to which I referred in an earlier part of this judgment, *Flannery v. Waterford and Limerick Railway Company* (4), although that was an action for damages in respect of an injury caused to a passenger in which, of course, the onus would be largely on him, Palles, C. B., laid it down that the accident must have been caused in one of three ways: (1) through some defect in the line; (2) through some defect in the carriage which ran off the line; (3) through some mismanagement of the engine and train while running. And it appears to me that mutatis mutandis that must always be very near the true principle to be applied in such a case as that with which I am dealing. The injury, if caused by an act of the company at all (and I think I have shown that it must have been), must have been caused by some carelessness in loading the goods, or after they were loaded, by some careless act of the company's servants, either individually or in the management of the rolling stock and all that passed it while the train was en route or being shunted. And as nobody knows what that act was, it seems to me that the defendant com-

pany is placed. to say the least of it, in very difficult, if not hopeless, position. But this case is not so difficult as some might be, because we have here admitted acts of the defendant company, any one of which might have caused, and probably did cause, the fire, and those acts all appear to be of a kind which is not within the contemplation or meaning of Ss. 151 and 152, Contract Act. So far then as the origin of the fire has to be determined and the degree of negligence on that account for which the defendant company is fairly liable, I think it is clear that the defendant company by some act of its own caused the fire, and on the admitted facts the only reasonable conclusion is that that act was not such as an ordinary man would have done had the goods been in his own and under his complete control. In other words, in my opinion, the defendant company is plainly responsible for the fire.

That being my conclusion on the first and most important point in the case, it is less necessary than it otherwise might have been to examine in detail another mass of evidence relating to the steps taken by the defendant-company's servants at Bangrode and Rutlam to quench the fire after it had been discovered. Here again the shaping of the case has plainly been influenced by the result of *Lakhichand's* case (1). But it is surely rather unreasonable to insist that because in that case it was found that the defendant Company was negligent and, therefore, to that extent liable, because it did not take very simple, easy, effective steps to put out the fire, that here the defendant company must likewise be held liable because they did not do all sorts of extreme, impracticable things which having been done, as far as the evidence goes, the destruction now complained of could not have been averted. Briefly, the plaintiff complains that the fire was discovered at 3-30 a. m., but no message was sent to Rutlam for help till an hour or so had elapsed, and then the Rutlam authorities took no immediate steps to send water to Bangrode. Further, that it amounts to negligence on the part of the defendant-company not to have maintained at Rutlam an abundant supply of water together with fire-extinguishing apparatus, and in a

less degree that they did not do the same at Bangrode. The latter point is a question of law and does not turn on any evidence at all. For the facts are admitted. There was not enough water at Rutlam to supply the needs of that station, and there was no apparatus kept there for putting out fires on a large scale. It certainly seems surprising, considering the large amount of merchandise which must be constantly lying at Rutlam, considering too that it is an engine-changing station and therefore in need of a large supply of water, that the two wells on which it depends locally are allowed to become practically useless, and that while depending for its engine water upon a water train which runs sometimes once, sometimes twice a day to the little roadside watering station of Ghatla, three miles from Rutlam, it possesses no fire-extinguishing apparatus at all. So that should a fire occur in the sidings there involving loss to perhaps lacs worth of goods, the station authorities say that they would not be in a position to put such a fire out. Apparently the nearest station at which any proper fire extinguishing apparatus is to be had is Godhra, rather more than 115 miles from Bangrode.

Of course, it was out of the question to obtain that in time to be of any service in the present case of fire. But as I say all that depends upon admitted facts and the point to which much evidence and argument has been addressed is simply this, whether when the Rutlam officials learnt of the fire between 4 and 5 a. m. they ought not at once to have sent the water tank train to fill up at Ghatla and go on to Bangrode? The railway staff have assigned a great many reasons why in existing circumstances this could not possibly have been done. All these reasons may be reduced to one, that doing what the plaintiff suggests would have so congested the traffic, already blocked and much behind time, that it could not reasonably be expected that the company would have faced all that inconvenience and loss for the sake of saving a single waggon load of the plaintiff's goods. If that were all there is to be said on the point, I think it would be a perfectly fair answer that the defendant company then ought to pay the plaintiff the value of his goods. If to suit their own

convenience and in their own interest they did not adopt means which they might have adopted to save the plaintiff's goods, then it might be urged that they preferred their own interests to those of their bailor. But I think the real answer is much simpler. Mr. Storrer's evidence is emphatic. He declares that had the water tanks arrived all full, in the absence of force pumps and hoses, no good could have been done. The burning waggon might have been surrounded by water tanks and yet if there were no other means of utilising the water than throwing it out of hand buckets at the burning waggon, from a distance of 15 feet, it would have been as impossible as before to get the fire under.

Once the fire had got hold of all the bales, this is probably true. For notwithstanding a fairly liberal supply of water from two engines and finally the tank of drinking water which was detached from the up-train at about 10 a. m., it is clear that the staff at Bangrode could not make the slightest impression on the fire. Now had the station master at Rutlam used the utmost diligence, it is impossible, I think, that he could have sent the water train with all its tanks filled so as to reach Bangrode before 6-30 in the morning. And considering the accounts we have of the fire at 3-30 and the fact that it steadily increased in fury and at no time was held in check, it may be concluded that by 6-30 it would have been entirely beyond the control of water however abundant, which could only be pitched at it out of buckets from a considerable distance. Mr. Storrer says that when he reached Bangrode say at 8-30, the fire was raging so that he would not have cared to go within 15 feet of it. He did, as a fact, get much nearer, but that because he was protected by the cab of the engine.

That being so, I think the whole of the evidence about the water train and the question whether it might and ought to have been sent straight to Bangrode after filling up at Ghatla like, most of the rest of the evidence in the case, may be entirely neglected. If, had the water train been sent, it could have given no effective help, then there was no use in sending it.

But it may be doubted whether the

want of water and fire-quenching appliances at a station like Rutlam is not in itself evidence of negligence. Subsidiary to this is the consideration whether the local staff of Bangrode ought not, had they exercised proper care and vigilance, to have seen the fire long before 3-30. Once the shunting was over, say by 12-15, there can be little doubt that the station night staff took no further interest in the stabled train, and in all human probability they all went to sleep till the arrival of the 63-down at 3-30 woke them up. By that time the fire had broken out and was blazing fiercely. I think that the staff at Bangrode were right to isolate the waggon at once and to try to get as many bales of it as possible while this was being done, but I should hesitate to say, did I think anything turned upon it, whether they were equally right in not having at once applied for help to Rutlam instead of allowing a valuable hour to pass. But as there was no help available at Rutlam the point becomes immaterial.

I hope that I have not treated this part of the case too cavalierly. But let the evidence be handled how you will, the result must always be the same. It was physically possible to have dispatched the water train, so that it might have reached Bangrode with all its tanks full between 6 and 7 a. m. But doing so would have caused very serious and widespread dislocation of the traffic and would, as far as I can judge, have done no good. Nothing really turns on the laboriously accumulated details concerning the actual hours at which down trains were to leave, and in fact did leave, Rutlam. Nor can I see that anything is gained from a consideration of so much of the evidence as may be related to hypothetical conditions. If both wells at Rutlam had been kept full to the brim, the station itself might not have needed the water brought in by the water train that morning at about 8-20. But the dispatch of the water train would still have blocked the section and thrown the already congested traffic into worse confusion. It may be thought strange that when Bantleman, the Station Master of Rutlam, learnt of the fire and received a call for help at say 5 a. m., he did not at once go to Parr who appears to have

had the disposition of the water train and confer with him about what had best be done. Parr was, of course, asleep at the time, and the evidence is that the water train could not have been made up for dispatch without his concurrence and orders. But Bantleman evidently never thought of it. Indeed he did nothing except authorize the Bangrode staff to stop the up train, which but for delays should have been at Bangrode a good deal earlier than it was and take off the drinking tank to use in putting out the fire. Bantleman did not even mention the fire to Mr. Storrer who was leaving Rutlam between 8 and 9 a. m. for Bangrode.

But the explanation is that in all the circumstances of the case Bantleman judged that nothing effective could be done at Rutlam and so took what appeared to him to be the best course, leaving the section between Rutlam and Bangrode clear for scheduled trains in ordinary course (though all much behind time) and trusting to the arrival of the drinking water tank on the up train being in time to give the needed aid.

In all the circumstances, both at Bangrode and Rutlam, I do not think that the staff of either station is to blame. The Bangrode men all appear to have worked hard and loyally with the limited means at their disposal. And the most that can be said against Rutlam is that it ought to have had, what it had not, an efficient fire-quenching apparatus and an abundant supply of water. The consideration must always be a grave one in regard to a station of such importance as Rutlam, and it will doubtless engage the attention of the defendant-company. It is one thing to say that a railway company cannot in reason be expected to sink all possible profits in the upkeep of efficient fire brigades and apparatus at every station, however insignificant, along the whole system, and quite another to say that they are under no obligation to provide such precautionary agency at great stations where goods must constantly accumulate and be exposed to the risk of fire. Had this fire occurred at Rutlam and lacs of rupees worth of damage been done, it may be doubted whether a Court would have listened favourably to a plea that the fire could not have been extinguished because the

company does not maintain any staff to work, or apparatus to be worked, to put out fires. And indirectly, of course, the line of attack may be extended, as it has been in this case, the length of contending that had there been all that there ought to have been at Rutlam, effective use might have been made of it to extinguish the fire at Bangrode. But on that ground alone I should not have thought myself justified in holding the defendant-company liable. If they were not liable for the origin of the fire, then I do not think they would be liable at all. As to what was done at Bangrode by the local staff, a good deal of time was spent over the purely hypothetical question whether had there been a force pump in the well, water in sufficient quantity to cope with the fire, when first detected, might not have been available. The fact is that the water in the well was very low, and that there was no force pump. I think it is going too far in cases of this kind to put forward all sorts of hypothetical conditions under which loss might have been averted or minimized, and then charge the defendant-company for what loss was sustained because those conditions did not exist. The trend of sparkage cases in England certainly encourages such attacks, but I think they ought to be kept within due bounds, in view of practicalities governing the management of great systems of railway in this country. Moreover, unless there had been pressure pumps and fire houses as well as a force pump in the well, very little more could have been done to put out the fire than was done by the Bangrode staff. It is true that so long as men were able to be on the top of the waggon, and this was possible for some time after the fire was discovered, they might have dealt with it much more effectively had the supply of water at their command been much more copious than it was. Bringing buckets of water from a well at considerable distance two at a time to throw at the fire was, of course, utterly futile. And doubtless no more could have been done in the condition of the well, while much more might have been done had there been a force pump in it.

On the other hand it is unreasonable to expect the defendant-company to set up force pumps in every well at every

roadside station along the line and maintain them on the mere chance that some day a fire may occur there. Nor do I attach any importance to the want of any chemical preparations for extinguishing-fires. I am not in a position to say whether had there been any chemical fire-extinguishers the fire might have been got under. I was referred to the late Aisgill disaster and told that chemical fire-extinguishers were used there with good results, but there is no evidence on record to prove this. Nor does the defendant-company use chemical fire-extinguishers anywhere on its whole system. Having regard to extreme proportional rarity of fires while goods are being transported by the defendant-company, I think that they are quite justified in contending that they are under no liability to incur a heavy, perhaps a ruinous, expense to guard against these uncommon contingencies. But that only applies, of course, to the part of the case with which I am dealing. I cannot too often repeat that so far from being an answer on the first part of the case, the rarity or otherwise of fires affecting goods of this quality carried under ordinary conditions rather points to the conclusion I have reached against the company. If fires were of constant daily occurrence, then the method of transport would have to be re-organised; if they are of very rare occurrence, when they do occur they prove positively that something very unusual had happened. If the defendant-company say that engines passing and re-passing waggons full of pressed bales of cotton properly loaded and sheeted very seldom set them on fire it must be because those engines do not as a rule emit dangerous sparks, or the conformation of the sheeting is such as seldom to afford lodgment to dangerous sparks when thrown upon it. Nonetheless if one fire has been caused in that way, it becomes clear that here is a real source of danger easily preventable by taking very ordinary precautions, and the defendant-company is, in my opinion, bound to see that every reasonable precaution is invariably taken.

In all the voluminous, and for the most part utterly useless, evidence got together in this case there is not a word, I believe, to show that the defen-

dant-company either anticipate any danger from this cause or have issued orders of any kind to guard against it. It may be a rare but it is a recurrent cause, a continuing danger to which no private owner of valuable goods would subject them if he could guard against it. To go no further than the very recent records of this Court, this is the third case I recollect within a very few years in which goods carried by a railway company have been destroyed by fire. In *Lakhichand's* case (1) the Court held that the company was not responsible for the origin of the fire which was left for ever unexplained. In the other case, which was not properly a case of goods being carried but of grass lying at a station, the Courts found that the defendant-company was liable, as the fire was due to sparks thrown out by a passing engine. Now if sparks thrown out by a passing engine can ignite grass lying on a platform or in a station yard, or plantations or bean stocks (as in two well-known English cases) beside the line of railway, it is clear or ought to be clear, that they may also ignite goods in waggons which are being drawn along the line.

It is merely a question of distance and the degree of protection afforded the goods by the method in which they are loaded and being carried. The distance whether danger lies in a passing engine can never be nearly as great as in the cases I have mentioned, and I have already shown that, while sheeting the goods may afford some slight protection, may make it much less likely that a flying spark should find a comfortable and dangerous resting place, this alone is not sufficient to absolve the company from taking every precaution in the management of its engines, in addition. If it could be shown that the sheets put upon the waggons were completely fireproof (in fact they are highly inflammable) then the defendant-company might reasonably say that having so covered the goods they were entitled to ignore any risk from flying sparks thrown out by passing engines. The facts however do not warrant any such position. The sheets are as likely to catch fire as the cotton, if a spark falls upon them and is not immediately blown off or extinguished; sparks are constantly being emitted within range of these

sheeted waggons, and occasionally they do light and dwell on and ignite the sheeting. Even in the case of a covered waggon, as in *Lakhichand's* case (1), in all human probability the fire was caused, as conjectured by Batchelor, J., by a spark from the engine falling through the narrow aperture in the roof of the carriage, and considering that, if I remember right, it was actually next the engine, I think that the defendant-company were, to say the least, unusually fortunate in having been able to convince the trial Judge and the learned Judges of appeal that the fire was due to no negligence on their part and that they had taken all the care which the law required them to take of the goods entrusted to them. This case is on an altogether different footing of fact and is much more difficult, because of the length of time and the distance covered and the incidents which happened between the commencement of the loading of the waggon at Ujjain and the fire being discovered at Bangrode. I must not be thought to be calling in question in any way the authority of the decision of the appeal Court in *Lakhichand's* case (1).

I have indeed adopted the only rule approaching to a general rule of law laid down by their Lordships in that case, namely, that where the defendant-company admits that it is not aware of the cause of the loss, damage, or destruction, it is not on that mere pleading to be held answerable. But further than that I cannot go and I do not see that I am bound to go by a single word in the judgment of the learned Chief Justice in that case. I am still to consider on the evidence (if there be any relevant and material evidence) and the admitted facts whether the company has absolved itself within the meaning of S. 72, Railways Act and Ss. 151 and 152, Contract Act. That must always be a question of fact in each case depending upon the facts of that and no other case, and here, in my opinion, the company has entirely failed to absolve itself of the responsibility cast upon it. I think it necessary to add these remarks because at the conclusion of his final address Mr. Binning said that whatever be my own view he apprehended that I should feel myself bound by the decision of the Court of appeal. I

certainly do. I have not consciously in the whole of this judgment gone a step beyond all that I can discover in the learned Chief Justice's judgment which could fairly be called a ruling of law binding on all the original Courts. I have permitted myself to comment on Batchelor, J.'s criticism of the judgment of the Privy Council in *Chouthmull Doogur v. The Rivers Steam Navigation Co.* (3) because it seemed to me absolutely essential that I should do so if I was to make myself clearly understood. For, I am as strongly of opinion as ever that that judgment being not only of the highest authority and therefore binding upon all our Indian Courts, lays down a perfectly correct and easily intelligible principle not of law but of proof which is quite a different thing. And I believe that my method of dealing with this case while it leaves the rule laid down by Scott, C. J., untouched is strictly in accordance with what was done by their Lordships of the Privy Council in the case of *Rivers Steam Navigation Co v. Chouthmull Doogur* (3).

I trust that I have now made good what I have said more than once in the course of this judgment that at least ninety per cent of the evidence is utterly useless. It will be seen that if I am right every fact which needs to be considered and forms part of the legitimate reasoning up to the main conclusion is virtually admitted. And the same can be said with almost equal correctness of the second part of the case which I have dealt with as shortly as I possibly could in view of my first finding. It has I am afraid become a tradition of the Bar founded on the far away dictum of some eminent counsel that the right way to conduct a case of any importance is to heap up all the bricks you possibly can within the limits stretched to their uttermost of the laws of evidence on the off chance of making use of some of them in constructing the edifice of the final argument. Continuing that metaphor, I may say the whole field and surrounding country upon which have been built the tiny edifices of counsel's final arguments to me have been made a mass of useless bricks and debris. In my opinion that is not the best but the worst way of conducting a case. I believe that had careful preparatory reasoning and re-

flection on both sides, with a full knowledge of what the evidence which they could call really was, been given to this case before plunging into it with an eye to the standard pattern I have previously mentioned all the evidence that was necessary or ever likely to be referred to again could very easily have been laid before the Court in two or at most three days. But as both parties appeared as bent upon taking the somewhat tedious and profitless course that was taken, and no doubt the case will be carried to the Privy Council, I will say no more on that point. Perhaps I am wrong and the learned counsel may prove to be right, but it will be seen that in this judgment, just as in the concluding addresses of counsel on both sides to me, very little use indeed has been made or (from my point of view) ever could profitably have been made of a very great deal of the evidence oral or documentary which now forms the bulky record.

I find then that the railway company is liable for the origin of the fire and the entire resulting loss. I find that the defendant company has entirely failed to show that in dealing with these goods it exercised all the care that an ordinary man would have exercised, had the goods been his own and the whole machinery of transport under his own control. And I find that the defendant company is not liable in respect of negligence or carelessness in dealing with the fire after it was discovered.

G.P./R.K.

Suit decreed.

A. I. R. 1914 Bombay 177

BEAMAN AND HAYWARD, JJ.

Madhavrao Keshavrao and another —
Defendants—Appellants.

v.

Sahebrao Ganpatrao and others —
Plaintiffs—Respondents.

Second Appeal No. 329 of 1913, Decided on 21st August 1914, from decision of Asst. Judge, Poona, in Appeal No. 260 of 1911.

Transfer of Property Act, S. 58 (c)—Mortgage by conditional sale by contemporaneous execution of documents of sale and resale.

Where the defendant sold the property to the plaintiff for Rs. 300 and got on the same day a deed executed by the plaintiff to resell the property to him for the same amount and

remained in possession on payment of Rs. 18 as rent, and it was found that the real value of the land was something between Rs. 750 and Rs. 1,500, and that for rent was Rs. 75 a year:

Held: that the real intention of the parties was to effect a mortgage by conditional sale by the contemporaneous execution of the two documents of sale and resale. [P 178 C 1]

T. R. Desai—for Appellants.

A. B. Gumaste—for Respondents.

Hayward, J.—The plaintiffs sued as purchasers from the defendants to recover possession of the purchased lands which were subsequently leased to the defendants. The defendants pleaded that the transactions amounted really to a mortgage which they were entitled to redeem, and not to a sale and subsequent lease, owing to a contemporaneous agreement for a resale. The original Court held in all the circumstances that the two documents effected a mortgage and not a sale. The first appeal Court held on a practically similar view of the circumstances that the two documents constituted a sale with an agreement for resale.

The judgment of the learned Subordinate Judge is not as clear as it might have been and consists very largely of a vain repetition of the evidence without any indication of the particular bearing of the evidence quoted upon the issues to be determined. But it appears that the following material facts were held established. On 16th September 1892, a relation of defendants sold his interest in the lands for Rs. 300 to one Manikchand. On 7th November 1892 defendants bought out Manikchand for Rs. 300 raised by the sale and resale in suit. From 1895 onwards the defendants remained in possession as tenants of their purchaser with liability to pay the assessment amounting to Rs. 32 at a nominal rent of about Rs. 50. But as a matter of fact the assessment was not paid by the tenants, but by the purchaser, so that the rent actually received was about Rs. 18 only, which would be interest at 6 per cent. on the purchase money, Rs. 300, instead of the nominal rent of Rs. 50. There was, subsequent to the sale and resale, a transfer of the names in favour of defendant 1, and not in favour of the purchaser, in the revenue records. There was evidence to show that Rs. 300 was a wholly inadequate price for the lands. Two kul.

karnis stated that a fair rent would have been Rs. 75 a year, so that the real value of the lands would have been anything from Rs. 750 to Rs. 1,500. It appears that these were the facts upon which the original Court held that the real intention of the parties in executing the two documents of sale and resale was to effect a mortgage, and not an absolute sale with agreement of resale.

The first appeal Court appears to have accepted these facts generally though the learned Judge, without stating definitely that he considered Rs. 300 a fair price, cast some doubt upon the value of the lands as estimated. On those facts he came to the opposite conclusion, namely that the proper construction of the two documents was that they effected an absolute sale with an agreement for resale.

On second appeal to this Court it has been urged that in view of the facts established and the contemporaneous nature of the two documents the proper construction would be that they constituted conditional sale. We have no doubt in all the circumstances that that is the proper construction and that the real intention of the parties was to effect a mortgage by conditional sale by the contemporaneous execution of the two documents of sale and resale. It was suggested on the other side that it was not open to us to speculate on the exact relations of the parties in this suit, which was in form one between a landlord and tenant, but it appears to us that the real nature of the leases as well as of the transactions of sale and resale have been called in question in this litigation, and that we are bound to consider them in view of the very wide terms of S. 10-A, Dekkhan Agriculturists' Relief Act.

We must accordingly allow this appeal and restore the decision of the original Court and reverse that of the appeal Court. Each party to bear his own costs of both appeals.

Beaman, J.—I concur in the judgment just delivered by my learned brother. I have no doubt but that the contemporaneous documents of 1892 do constitute what is known in this country as a mortgage by conditional sale. Neither have I the least doubt that that was the intention of the

parties executing them. Such mortgages are legislatively recognized, and I have only to observe that in no true mortgage of this class will any debt be apparent. It is idle therefore to criticize mortgages by conditional sale by reference to the essential conditions of a mortgage in the English sense of that word. It only needs to peruse the judgments of the Courts relating to these mortgages to observe how necessary it is to bear this in mind when the question is, whether upon an interpretation of documents alone the result is a mortgage by conditional sale or an out and out sale.

G.P./R.K.

Appeal allowed.

A. I. R. 1914 Bombay 178

BEAMAN AND HAYWARD, JJ.

Dolatram Dwarkadas—Applicant.

v.

B. B. & C. I. Railway Co.—Respondent.

Civil Appln. No. 234 of 1913, Decided on 12th June 1914, against Small Cause Court Judge, Ahmedabad, in Civil Suit No. 3040 of 1912.

Railways Act, S. 72—Railway receipt is mercantile document of title—Endorsee can bring action for loss of goods—Contract Act, S. 108, Excep. 1.

A railway receipt is a mercantile document of title, and its endorsee has sufficient interest in the goods covered by it to maintain an action for their loss. [P 173 C 2]

G. N. Thakor—for Applicant.

Binning—for Respondent.

Judgment.—After having given this nice question our most careful consideration we think that, in view of the recent decision of this appeal Court in *Amarchand & Co. v. Ramdass* (1), it must be taken as settled law that a railway receipt is a mercantile document of title. That being so, we think it necessarily follows that the endorsee of such a railway receipt has sufficient interest in the goods covered by it to maintain an action of this kind. We are therefore of opinion that the decision of the Subordinate Judge with Small Cause Court powers was not according to law. Reversing his decision upon the point just mentioned we agree with his findings of fact, and now order that the decree be made in the plaintiff's favour in the terms of those find-

(1) [1913] 21 I. C. 343=33 Bom. 255.

ings. The defendant company must pay all the costs.

G.P./R.K. *Rule made absolute.*

A. I. R. 1914 Bombay 179 (1)

HEATON AND SHAH, JJ.

Emperor—Prosecutor.

v.

Shinvar Birsha and another—Accused.
Criminal Ref. Nos. 106 and 107 of 1913, Decided on 19th February 1914, made by District Magistrate, Thana.

Practice — Deterrent sentence — All circumstances calling for deterrent sentence should be placed before trying Court.

It is very undesirable to trust exclusively to the High Court's power of correcting sentences of the lower Courts where the sentences ought to be deterrent. Where the prosecuting authorities want that a sentence ought to be deterrent, they ought to put before the trying Court those circumstances on which they rely, and they ought to ask the trying Court to impose a sentence which will serve the purpose that they think should be served. [P 179 C 1, 2]

S. S. Patkar—for the Crown.

Judgment.—We can deal with these two references together. In each case the penalty is a fine of Rs. 100, and in each case the District Magistrate thinks that the penalty is insufficient for the offence.

We quite agree that the penalty does appear to be insufficient. The offence is represented to be one that is frequently committed and seldom discovered, or rather it is seldom that a conviction can be obtained against the offender. In one case however of the same kind (Reference No. 102 of 1913), we have made an example of the convicted person by sentencing him to a substantial term of imprisonment. In that case the fine was only Rs. 30, as against Rs. 100 in each of the present cases. Bearing that in mind and in the hope that the one case in which we have made an example will serve as a warning, we refrain from enhancing sentences in these two cases.

We must again call attention to a matter which in other cases we have mentioned already, and it is this. It is very undesirable to trust exclusively to our powers of correcting sentences of the lower Courts where the sentences ought to be deterrent. In a case of that kind, where the prosecuting authorities think that a sentence ought to be deterrent, they ought to put before the trying Court those circumstances on

which they rely and they ought to ask the trying Court to impose a sentence which will serve the purpose that they think should be served. If this is done, as it ought to be done, there will be fewer of these references to us for enhancing sentences.

G.P./R.K.

Order accordingly.

A. I. R. 1914 Bombay 179 (2)

SCOTT, C. J., AND HAYWARD, J.

Nagindas Jekisondas and others—Defendants—Appellants.

v.

Nanabhai Dullabhram—Plaintiff—Respondent.

Second Appeal No. 720 of 1913, Decided on 24th August 1914, from decision of Dist. Judge, Surat, in Appeal No. 10 of 1913.

Mortgage — Redemption — Contemporaneous documents of sale and resale of house — Transaction held to be mortgage giving right of redemption.

Where a vendor sold his house to his vendee for Rs. 399 and on the same day executed another document by which he took the house on hire from the vendee at Rs. 2-4-0 a month and the vendee contemporaneously agreed by a third document that if within three years the vendor paid Rs. 399 as principal and paid the rent from month to month, he would resell the house to the vendor :

Held : that these three documents read together amounted to a mortgage of the house, that is to say, a transfer of the property with the right of redemption within a fixed period and an agreement to pay rent in lieu of reasonable interest. [P 180 C 1]

D. A. Khare and P. D. Bhide—for Appellants.

T. R. Desai and Ratanlal Ranchhodas—for Respondent.

Judgment.—This was a suit for redemption by the plaintiff to recover a house. The question for decision by the lower Courts was, whether the transaction with reference to which the plaint was instituted was a sale or a mortgage. On 30th March 1900, three documents were executed. One of them purported to be a sale-deed. It recited that the house had been given in mortgage with possession to one Jagjiwandas Kaliandas in 1897, but the mortgagor had got possession of it as a tenant and continued to hold it as a tenant up to 30th March 1900, and that a decree had been obtained by the mortgagee in 1900 and Rs. 175 was due. This amount had been paid by Ghelabhai Atmaram, the ostensible vendee, and the balance of Rs. 224 had been

paid in cash making altogether Rs. 399, and consequently the house having been redeemed from the mortgagee was taken from the possession of the mortgagor and given into the possession of the ostensible vendee, who was made the absolute owner.

Another document executed between the parties at the same time was one by which the ostensible vendor said that he had taken the house on hire from the vendee at Rs. 2-4-0 a month, or Rs. 27 a year, but the vendee might at any time demand possession of the house and it was then to be given up to him.

The third contemporaneous document was one by which the vendee agreed that, if within three years the vendor paid Rs. 399 as principal and paid from month to month the rent accruing due under the rent-note passed that day for Rs. 27 as rent every year, he would re-sell the house to the vendor at his expense at any time within three years. Then there was a clause that, if the rent was not paid for three consecutive months, the agreement for re-sale should not be binding upon the vendee. The fourth clause not following the law of landlord and tenant as expressed in S. 108, T. P. Act, provided that if within three years the house was destroyed by any calamity or vis major, still the vendee and his heirs and representatives had the right to recover the principal amount of Rs. 399 and the rent which might be due from the person or the property of the vendor, or his legal representatives, or from the land of the house, or from whatever other source he pleased, a provision suggestive of one of the remedies of a mortgagee under S. 68, T. P. Act. In the sixth clause there is again a reference to the principal sum of Rs. 399 and the rent which may be due.

Now the rent amounts to $6\frac{3}{4}$ per cent upon Rs. 399, and we have no difficulty in arriving at the same conclusion as was arrived at by the Judges in the two lower Courts that these three documents read together amount to a mortgage of the house, that is to say, a transfer of the property with the right of redemption within a fixed period and an agreement to pay rent in lieu of reasonable interest. It does not ap-

pear to us that the facts in the case which have been relied upon, such as *Kapildeo Singh v. Ramrikha Singh* (1) and *Alderson v. White* (2), are so similar to the facts in this case that we ought to arrive at the same conclusion as was arrived at by the Courts in those cases. Agreeing as we do with the lower Courts, we confirm the decree and dismiss the appeal with costs.

G.P./R.K.

Appeal dismissed.

(1) [1910] 8 I. C. 484=33 All. 237.

(2) [1858] 2 De. G. & J. 97=4 Jur. (n.s.) 125=
6 W. R. 242=44 E. R. 924=119 R. R. 38.

A. I. R. 1914 Bombay 180

BEAMAN AND HAYWARD, JJ.

Bandoo Krishna Kulkarni—Plaintiff—Appellant.

v.

Narsingrao Konherra—Defendant—Respondent.

First Appeal No. 76 of 1913, Decided on 12th June 1914, against First Class Sub-Judge, Belgaum in Darkhast No. 443 of 1909.

Civil P. C. (1908), S. 37—Court passing decree can proceed with execution though Court of Wards becomes party to execution proceedings.

The Court passing a decree has jurisdiction to proceed with execution notwithstanding that after the decree the Court of Wards becomes a party to the execution proceedings.

[P 181 C 1]

Jayant G. Rele—for Appellant.

Nilkanth Atmaram—for Respondent.

Judgment.—The only question arising in this first appeal is whether the Court of the Subordinate Judge had jurisdiction to proceed with the execution of its own decree. When the suit was instituted no Government servant was a party to it, and it was not until after the decree that the Court of Wards was added. In terms therefore, S. 32, Civil Courts Act, does not apply. But it is contended inferentially with reference to S. 37, Civil P. C., that where a party is added in execution who, had he been a party when the suit wherein the decree was passed was instituted, would have deprived the Court of its jurisdiction, that Court ceases to have jurisdiction for all purposes of executing its own decree. That contention gained some colour from S. 37. But we find that the facts here cannot be distinguished in any material particular from the facts in *Gopal Apaji v. Keshavrao*

Konherrao, First Appeal No. 29 of 1913, decided by Scott, C. J., on 30th September 1913, where a Bench of this Court decided that the Court which passed the decree had jurisdiction to proceed with the execution, notwithstanding that after the decree the Court of Wards had become a party to the execution proceedings. And we see no reason to doubt that that case was correctly decided, nor why by giving a different decision here on the same facts, we should encourage uncertainty and a conflict of opinion. We therefore think that the present appeal must be allowed, and the Court below be directed to proceed with the execution of the decree. The appellant must have the costs of this appeal.

G.P./R.K.

*Appeal allowed.***A. I. R. 1914 Bombay 181**

SCOTT, C. J. AND HEATON, J.

Brendon, B. A.—Defendant—Appellant.

v.

Shrimant Sunderabai—Plaintiff—Respondent.

First Appeal No. 80 of 1912, Decided on 1st August 1913, from decision of 1st Class Sub-Judge, Belgaum, in Suit No. 50 of 1909.

(a) **Hereditary Offices Act (3 of 1874)**—Inams to which settlements within the purview of Summary Settlement Act (2 of 1863) relate are not within Vatan Act (1874)—Summary Settlement Act (2 of 1863).

Settlements which have been effected under, and are within the purview of Act 2 of 1863, prevent the inam lands to which they relate from being subject to the provisions of the Vatan Act of 1874, because the holders of those settlements are no longer hereditary officers holding for service. [P 183 C 1]

(b) **Custom—Service land is usually inalienable**—If service comes to an end, last holder can put an end to tenure based on family custom—Service land remaining in family for many years and descending by primogeniture rule is presumed to be held for service.

Service land is usually inalienable, and evidence that service land has remained in a family for a long period of years and descended by the rule of primogeniture is more consistent with the fact of its being held for service than with the theory of any special family custom. If the service has come to an end, the last holder, if he has no sons or cosharers, can put an end to the tenure, if any, based upon family custom. [P 183 C 1, 2]

(c) **Inams—Inams of Desais of Navalgund should be treated as property of Hindu land-owner subject to payment of quit rent to Government.**

The Inams of the Desais of Navalgund should be treated as the property of an ordi-

nary Hindu land-owner, subject to the payment of the agreed quit-rent to Government.

[P 183 C 2]

(d) **Evidence Act, S. 41—Decisions of probate Court on issues raised are conclusive and cannot be retried—Will—Probate.**

Where in regard to a will it was contended in a probate Court that the testator had revoked his will twenty-four hours before his death and that he had given authority to his widow to adopt but the probate Court found against the contention and its decision was affirmed on appeal:

Held: that the decision of the probate Court on the contentions raised was conclusive and that it was not open to a District Court in a subsequent suit to retry those issues, [P 184 C 1]

Jayakar and Rudrappa and Mulgaonkar—for Appellant.

Jardine and Weldon and Nilkanth Atmaram—for Respondent.

Judgment.—The plaintiff sued for a declaration that the codicil of the deceased Desai of Navalgund was inoperative and the defendants as executors had no rights under it, and that plaintiff 2 was the lawfully adopted son of the deceased, and they prayed for an injunction restraining the defendants from entering into possession of the plaintiff property. The Desai of Navalgund was the last of a series of Desais whose title came into existence in the time of the Bijapur monarchs in the 17th century. The Desai was the chief revenue officer of the district under both the Mahomedan rule and the Maratha rule which followed it. During the tenure of office of the family to which the deceased Lingappa belonged, many grants in inam of villages had been made to the Desai for the time being. Sometimes they were expressed to be for the Desai and his karkuns and sometimes they were grants given to the Desai simply.

After the disturbance and the unsettlement caused by the irruption of Tipoo Sultan into the southern Maratha country, the grants to the Desai family were eventually confined to ten villages.

The services of the Desai as a revenue officer were not made use of during the British Rule and he was informed in 1848 by the Collector under the provision of S. 2, Bombay Act 11 of 1843, that his service as a revenue official would not be required of him. At that time and for many years afterwards the officials of the British Government in the Southern Maratha country were occupied in investigating and passing decisions and coming to settlements

regarding claims to inam lands, held whether for service or as reward for past services, and in the course of the proceedings the Desai for the time being was offered the option of commuting his service by payment of an annual sum in the nature of a quit-rent for the lands which he held up to that time on service tenure, or by occasional payments in the nature of fines, both which classes of payment were styled "nazarana."

Under the Government Resolution No. 455 of 6th February 1862 the request of the Revenue Commissioner for sanction to the treatment of the Navalgund Desai's "potgee" as a personal holding continuable to the holder on the terms of the summary settlement was sanctioned, and in consequence of that sanction the offer of the settlement was made to the Desai, and that offer was accepted on the terms that the commutation payment should be in the nature of an annual mazarana or quit rent. That was in the year 1862. At that time there was no express legislative provision sanctioning such settlements, although it may well be argued that the commutation of a service, which was no longer wanted, by an agreement to pay a fixed yearly sum was within the competence of the executive authority in the Bombay Presidency. But any doubt as to the validity of the settlement is put an end to by reference to S. 12, Bombay Act 2 of 1863, which applies to the districts in which the Navalgund Desai's inam villages lay. It is in the following terms:

"All notices and orders issued, and all settlements made, in the districts subject to the operation of Act 11 of 1852, previous to the passing of this Act for the purpose of carrying out its objects, shall be as valid and as binding on Government, and on the holders and owners of, and all persons interested in, lands affected by such notices, orders, and settlements as if this Act had been passed before the said notices and orders were issued, and the said settlements made, which shall accordingly be regarded and taken to have been made under this Act, all the provisions of which, as to the future rights, privileges, and duties of the holders and owners of land to be brought under settlement by it shall apply to the

holders and owners of land already brought under settlement as aforesaid."

It has not been contended that the Bombay Legislature had not authority to enact that section validating the settlements so made, and the settlement made with the Navalgund Desai must, therefore be taken to be a settlement valid and binding upon the Government.

What then was the position of the Navalgund Desai after this settlement? He was no longer liable to render any service in respect of the lands held by him, and they were therefore no longer held upon a service tenure. The terms upon which they were held were that a fixed annual quit-rent should be paid for them. It is contended for the plaintiffs that the lands as service lands in the possession of the Desais for the last 200 years were impressed with the character of inalienability. It has been suggested, but faintly, that the inalienability arose by reason of family custom, but no evidence of any importance has been adduced in support of that contention.

The more serious argument is that lands assigned as emoluments of District Revenue Officers were inalienable by custom and by express legislative provision. The first legislative provision on the subject, to which we have been referred is Regulation 16 of 1827. As regards the argument based on custom we must consider whether the character of inalienability was attached to these lands by law or custom at the time of the passing of that regulation. The question was discussed by Sir Michael Westropp in *Krishnara v. Ganesh v. Rangrav* (1). He says:

"As to civil hereditary offices, and the inams (watan) annexed to them the balance of authority seems to incline in favour of the alienability in permanence (previously to British legislation) as well of the offices as of the inams appended to them, together or separately. . . . In the case of some, but not of all, such offices, the assent of the Native Government seems to have been necessary to the validity of the alienation, and also, if the watan were undivided, the assent of the coparceners, if any."

With reference to those last remarks, it is to be observed that after the settlement, which derives its con-

(1) [1865-67] 4 B. H. C. R. 1.

clusive validity from the legislative provisions of Act 2 of 1863, there can be no doubt as to the assent of the Government for the time being to the alienability of the inams, and as far as concerns the testator in the present case, there is no question of any coparceners, unless it be held that plaintiff 2 is an adopted son, and in that position entitled to the rights of a parcener. Authority therefore is in favour of the conclusion that up to the legislation of 1827 these inams were not inalienable.

Regulation 16 of 1827, S. 20, prohibited alienation, by any hereditary officer, of his official emoluments, and directed that such official emoluments enjoyed by a cosharer should not leave the family in which the office was vested. The Regulation of 1827 was superseded by the Vatan Act of 1874. But that Act came into force long after settlement of the inam lands in 1862, and settlements which have been effected under, and are within the purview of, Act 2 of 1863, prevent the inam lands, to which they relate from being subject to the provisions of the Vatan Act, because the holder under the settlement is no longer a hereditary officer holding for service.

Is there then any reason why the inams held by the Desai should, subsequent to the settlement, be regarded as impressed by any inalienable character such as does not appertain to the property of an ordinary Hindu landowner? It appears to us that there is not, and that conclusion is supported by the judgment of the Privy Council in *Rajah Mahendra Singh v. Jokha Singh* (2) with reference to what was known as "mafeebirt tenure." Service was commuted for a quit-rent, and it was held by the Judicial Committee, if the donee's descendants continue to pay the rent, the tenure is altered from service to rent. In the case of service land, which in practice at all events is not usually alienated, it is difficult to establish a family custom, which should have any effect, as distinct from the ordinary incidents of a service-tenure, and evidence that land has remained in a family for a long period of years, and descended by the rule of primogeniture where it is service land, is more consistent with

the fact of its being held for service than with the theory of any special family custom. Moreover, when the service has come to an end, the last holder, if he have no sons or cosharers, can put an end to tenure based upon family custom: see *Rajkishen Singh v. Ramjoy Surma Mozoomdar* (3). If then the inams of the Desai may be treated as the property of an ordinary Hindu landowner, subject to the payment of the agreed quit-rent to Government, there is no reason why he, in the absence of coparceners, should not dispose of that property by will. He has made some provision for his wife, plaintiff 1, providing her with Rs. 100 a month, and a certain retinue, and if he did make a will as is alleged, it is difficult to see how a subsequently adopted son can defeat the provisions of that will.

The will was propounded for probate in the District Court of Belgaum, a Court competent to try the questions arising in this suit. That Court decided that the will and codicil, under which the defendants claim, was a testamentary document executed by the testator, and as a consequence the provisions of the testator speak from the time of his death. These testamentary provisions include a provision for charity, based upon the recognition of the fact that he has no natural born son, and upon the assertion that he has not given and will not give the widow authority to adopt any son after his death. The contention however on behalf of plaintiff 2 is that he is a validly adopted son of the testator. In order to prove that eleven witnesses are produced who speak to words uttered by the testator within twenty-four hours of his death in which he stated that he had revoked his will and given his widow authority to adopt a son. These allegations were put forward in the probate Court by the same parties, plaintiffs 1 and 2, in their contention with the executors, who are the present defendants, who were then propounding the will and the codicil. Thirteen other witnesses were upon that occasion produced to prove the statements of the testator as to revocation of the will and authority to adopt, and those thirteen witnesses were disbelieved by the probate Court. The decision of the Court upon that point was

(2) [1873] 19 W. R. 211.

(3) [1875-76] 1 Cal. 186=19 W. R. 8.

affirmed by the High Court in appeal. The allegation of the plaintiffs involves the destruction of the conclusion arrived at by the probate Court negating the alleged revocation and affirming the testamentary character of the will which contains the statement with reference to authority to adopt. It appears to us that the learned Judge of the lower Court was in error in thinking that it was open to him, after the decision of the District Court in the will case, to try the question of the authority which was bound up with the question of revocation in the present suit. The issue which was decided by the probate Court was that the words of Cl. 9, as part of the will, formed part of a testamentary document speaking from the death of the testator, and that conclusively determined between the parties the question whether or not the testator had revoked his will 24 hours before his death, and whether or not the statement, as to his having given any authority to his widow to adopt, expressed his wishes at the time of his death. Therefore under S. 11, Civil P. C., the Subordinate Judge should not have tried the issue, because the District Court which tried the probate case was competent to try the present suit, although in order to relieve the superior Court of part of its work S. 15 of the Code provides that every suit shall be instituted in the Court of the lowest grade competent to try it, and therefore this suit was instituted in the Court of the First Class Subordinate Judge: see *Nidhi Lal v. Mazhar Husain* (4) and *Matra Mondal v. Hari Mohun Mullick* (5).

We now come to the case of plaintiff 3. He can only be joined in this suit with the other plaintiffs if he makes common cause with them, and claims that he is entitled jointly, severally or in the alternative, upon proof of the allegations contained in the plaint. His case is, he being a man of 40 years of age, born subsequent to the Settlement of 1862, that from his own knowledge he can say that his father and grandfather and great-grandfather were karkuns under the Desai of Navalgund, and that therefore they were entitled as beneficiaries, as persons answering a particular description in the sanads to

share in the revenues of the inam villages with the Desai. In so far as there is any contest between plaintiff 3 and plaintiffs 1 and 2 as to their respective rights to the revenues of the inam villages, plaintiff 3 is not competent to join with them in this suit, but we do not think that any question of misjoinder really arises, because upon the evidence in the case the only inam, in which it is clearly shown that the karkuns, whom plaintiff 3 claims to represent, were interested, was an inam of land amounting to 20 acres in Kalapur which is not in question in this suit: see Ex. 77, Cls. 11, 1, and Ex. 91. Plaintiff 3, therefore, in relation to lands in suit stands in no better position than plaintiffs 1 and 2. In respect of the lands in suit, other than the Patilki and Kulkarniki Vatan, in which plaintiff 1, as the widow of the testator, would be interested as Vatandar, and which under S. 5, Vatan Act of 1874, would not be alienable by the will, the suit must fail. If it is agreed which lands mentioned in the plaint are held upon service-tenure, as Patilki or Kulkarniki Vatan, they can be excluded from the decree dismissing the suit and the plaintiff will be entitled to a declaration regarding them. If an agreement cannot be arrived at there must be a remand to the lower Court to ascertain what those lands are. We think that in this case the costs of both parties in both the Courts should come out of the estate.

G.P./R.K.

*Appeal dismissed.***A. I. R. 1914 Bombay 184**

BEAMAN AND HAYWARD, J.

Vyankatesh Mahadev — Defendant—Applicant.

v.

Ramchandra Krishna — Plaintiff—Respondent.

Civil Revn. Appln. No. 251 of 1914, Decided on 25th June 1914, from order of Dist. Judge, Poona, in Misc. Appeal 3 of 1913.

(a) Civil P. C. (1908), Sch. 2, Cl. 18—Cl. 18 is restricted to cases when suit is instituted after agreement to refer.

Clause 18, Sch. 2, is restricted to cases in which the suit complained of has been instituted after the agreement to refer to arbitration. [P 185 C 2]

(b) Civil P. C. (1908), Sch. 2—Agreement to refer dispute to arbitration after institu-

(4) [1885] 7 All. 230=(1885) A.W.N. 1.

(5) [1890] 17 Cal. 155.

tion of suit—Application to stay suit must fail.

Where after the institution of a suit the plaintiff and the defendant entered into an agreement to refer the matter in dispute to arbitration, and the defendant moved the Court to stay proceedings.

Held: that the agreement did not fall under any of the clauses of Sch. 2 and that therefore the application must fail. [P 187 C 2]

(c) Civil P. C. (1908), O. 23, R. 3—Agreement to refer to arbitration though otherwise valid is not adjustment in suit within R. 3.

Per Beaman, J.—A mere agreement to refer to arbitration, even though it be in other respects valid, cannot be such as an adjustment in whole or in part of the suit as the Court can give effect to under O. 23, R. 3. [P 186 C 1]

(d) Civil P. C. (1908), Sch. 2—When Court is seised of cause, private act of parties cannot oust jurisdiction—For substituting private arbitrator for Court, law in Sch. 2 must be followed.

Where the Court is seised of a cause, its jurisdiction cannot be ousted by the private and secret act of parties, and, if they, after having invoked the authority of the Court and placed themselves under its superintendence, desire to alter the tribunal and substitute a private arbitrator for the Court, they must proceed according to the law laid down in the first 16 clauses of Sch. 2. [P 186 C 1]

Coyajee and B. V. Vidwans—for Applicant.

D. A. Khare and J. R. Gharpure—for Respondent.

Beaman, J.—A suit had been instituted, and it is alleged that the plaintiff and one of the defendants after the institution of the suit entered into an agreement to submit the matters in difference between them to arbitration. Thereupon the defendant moved the Court to stay the further progress of the suit. The first Court refused, and on appeal the learned District Judge was of opinion that the defendant's application could not be sustained and that the suit must proceed.

We are asked to interfere in the exercise of our revisional jurisdiction and to set aside that order of the learned District Judge. It appears to me that the agreement alleged to have been made between the plaintiff and one of the defendants does not fall under any of the clauses of Sch. 2; Civil P. C. The first sixteen of those clauses exhaust the whole process of arbitration after the suit has been instituted and the parties desired to submit their differences to arbitration under the control of the Court. The Court under those

sixteen clauses controls completely the whole course of the reference; indeed the reference is its own, and its jurisdiction is never at any time ousted until a good award has been made. In the event of an award having been made, but being set aside for any reason, the Court immediately resumes its jurisdiction and completes the trial of the action. The next class of cases provided for in Sch. 2 are those in which persons who have not instituted any legal proceedings desire to submit any difference between them to arbitration. Having agreed to do so either party may then bring the agreement into Court, and, if resisted by the other party, his application to have the agreement filed and further action taken upon it will be treated as a suit. Thereafter, again, the Court immediately assumes and retains control of the subsequent arbitration proceedings. The third and the last case provided for in Sch. 2 is where the parties who have not come into Court have not only agreed to refer matters in difference between them to arbitration, but have obtained an award. Here again the party desiring to enforce the award may bring it into Court and upon proper proceedings obtain a decree in conformity with it. There remains only one single clause (Cl. 18) which is of an exceptional character and virtually re-enacts a portion of S. 21, Specific Relief Act, which is declared to have no applicability to any arbitration proceeding provided for in Sch. 2. That clause, which is also to be found almost in totidem verbis in S. 19, Arbitration Act, provides for a special class of cases in which, after parties have agreed to submit matters in difference between them to arbitration, one of them in violation of such agreement institutes a suit in respect of any or all of those matters. Then the other party may set up in bar of the suit the agreement to submit to arbitration. If this analysis be correct, and I think there is no doubt but that it is, it is clear that what the defendant here relies upon is an agreement nowhere provided for in Sch. 2, Civil P. C., nor does it fall within the language or the spirit of S. 18, for that section, as I say, is designedly restricted to cases in which the suit complained of has been instituted after the agreement to refer to arbitration. It might be ob-

jected that no solid ground in reason can be found for refusing to extend the principle of that section to cases where, after a suit had been instituted, parties had privately agreed to submit the matters in difference between them to arbitration, and in spite of such agreement and in violation of it one of them insists on going on with the suit. The answer to that appears to me to be short and simple, and to cover other objections which might arise upon the other points I have very generally indicated, for, in my opinion, where the Court is seised of a cause its jurisdiction cannot be ousted by the private and secret act of parties, and if they, after having invoked the authority of the Court and placed themselves under its superintendence, desire to alter the tribunal and substitute a private arbitrator for the Court, they must proceed according to the law laid down in the first sixteen clauses of Sch. 2. Therefore it appears to me that there is no force whatever in the applicant's contention that a private agreement of this kind is on the same footing as the private agreement contemplated in Cl. 17 reproducing old S. 523, nor, as I have just explained, will it give him any right to invoke the assistance of Cl. 18. How then could it serve him? Only as a lawful agreement by which the suit had been adjusted wholly or in part. Doubtless any parties litigating in Court have perfect liberty to compose their differences amongst themselves by entering into any lawful agreement, compromise or satisfaction. And when this is done, they have only to apply to the Court to act under O. 23, R. 3. But it is equally clear that a mere agreement to refer to arbitration, even though it be in other respects valid, could not be such an adjustment in whole or in part of the suit as the Court could give effect to under O. 23, R. 3.

In my opinion therefore the learned Judge below was right and no case whatever has been made out for the exercise of our revisional jurisdiction. I would therefore dismiss this application with all costs.

Hayward, J.—The plaintiff brought a suit against defendant 1 with regard to a certain matter which was subsequently referred by them to private arbitration without leave of the Court. Defendant 1 thereupon applied for stay

of the suit in consequence of the reference to private arbitration outside the Court.

The original Court refused to stay the suit, holding that the reference had been made under a mistake of fact, and that in any case it did not amount to an adjustment of the matter in suit within the meaning of O. 23, R. 3, Civil P. C.

The first appeal Court did not decide the question as to mistake of fact, but held that there was no adjustment inasmuch as there had been no award within the meaning of O. 23, R. 3, and that further the suit could not be held to be barred by the contract to refer, as that contract was entered into subsequent to suit, and was not prior to suit as contemplated by S. 21, Specific Relief Act. Moreover, it pointed out that that provision had been repealed by R. 22, Sch. 2, Civil P. C.

On this application for revision it has been contended, though the contention has not been very seriously pressed, that the submission to arbitration did, as a matter of fact, amount to a lawful adjustment, but there does not seem to me to be any substance in that contention, as there was no resulting award as explained in the case of *Rukhanbai v. Adamji Shaik Rajbhai* (1) and *Venkatachellam Reddi v. Rangiah Reddi* (2). It is to be observed that there was a resulting award in *Harakhbai v. Jamnabai* (3), in which case it was held by the present learned Acting Chief Justice that there was a good adjustment within the meaning of O. 23, R. 3, to which effect could be given under the saving provisions of S. 89, Civil P. C.

But it has been contended, and strenuously contended, that a stay ought to have been granted of the suit. It has been argued that notwithstanding the pendency of the suit it was open to the parties to enter into an agreement to arbitrate privately, without leave of the Court, and to proceed to have that private reference to arbitration or the resulting award converted into an independent decree of the Court. It appears to me however that the matter is concluded by the wording of R. 3 and R. 15 occurring among the first sixteen rules referring to arbitration during pendency

(1) [1909] 1 I. C. 622=33 Bom. 69.

(2) [1911] 12 I. C. 372=36 Mad. 353.

(3) [1913] 19 I. C. 786=37 Bom. 639.

of a suit with the consent of the Court. R. 3 lays down the conditions upon which jurisdiction in the suit shall be withdrawn from the Court and that condition is that there has been an order of reference under that rule by the Court. As no other condition is stated it must be presumed that that is the only condition under which the suit could be removed from the jurisdiction of the Court. Then again R. 15 expressly provides the conditions under which jurisdiction in the suit can be resumed by the Court. It states that that can occur when the award either becomes void or has been set aside by order of the Court. Again, as these are the only circumstances under which jurisdiction can again be resumed by the Court it must be presumed that there are no other circumstances under which such jurisdiction could be resumed by the Court. A ruling to the contrary has been quoted to us in the case of *Harivalabdas Kallindas v. Utamchand Manekchand* (4) and it has been pointed out that that ruling was apparently approved of by one of the Judges in the case of *Pragdas v. Gardhardas* (5); but it seems to me that caution must be observed in giving weight to that distant authority in view of the observations of the Privy Council in the case of *Gulam Khan v. Muham-mad Hassan* (6). The Privy Council there appear to have taken the view that the rules corresponding to the present rules of the Code were exclusive and only rules permitting arbitration during the pendency of a suit before a Court, and that the succeeding rules corresponding to Rr. 17 to 21, Sch. 2 of the Code applied solely to arbitration in matters which had not come as suits before the Court. The Privy Council's decision has been so interpreted both by the Calcutta and Madras High Courts in the cases of *Tincoury Dey v. Fakir Chand Dey* (7) and *Venkata-chelam Reddi v. Rangiah Reddi* (2).

It has also to be observed that stay of a suit instituted after the reference to arbitration would alone appear to be contemplated by the wording of

(4) [1879-80] 4 Bom. 1.

(5) [1902] 26 Bom. 76=3 Bom. L. R. 431.

(6) [1902] 29 Cal. 167=2 I. A. 51=6 C. W. N. 226=12 M. L. J. 77=4 Bom. L. R. 161=25 P. R. 1902.

(7) [1903] 30 Cal. 218=7 C. W. N. 180.

R. 18, Sch. 2, which is almost identical with the concluding thirty-seven words of S. 21, Specific Relief Act, and that interpretation is borne out by the cases of *Peruri Suryanarayan & Co. v. Gullapudi* (8) and *Ramjidas Poddar v. Howse* (9) dealing with the corresponding S. 19, Arbitration Act. So that this application would have been bound to fail whether it had been possible to have recourse to R. 18, Sch. 2, Civil P.C., or the concluding words of S. 21, Specific Relief Act, or S. 19, Arbitration Act. It appears to me therefore that this application must be dismissed, and the order of the first appeal Court confirmed and it is therefore unnecessary to discuss the further question raised whether the decision of the learned Judge would or would not have amounted to irregularity in the exercise of the jurisdiction within the meaning of S. 115, Civil P. C. Rule discharged with costs.

G.P./R.K.

Rule discharged.

(8) [1909] 4 I. C. 133=34 Bom. 372.

(9) [1908] 33 Cal. 199.

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BEAMAN AND MACLEOD, JJ.

Malik Saheb Abdul Saheb—Defendant—Appellant.

v.

Mallikarjunappa Shivamurteya — Plaintiff—Respondent.

Second Appeal No. 890 of 1912, Decided on 3rd October 1913, from decision of Dist. Judge, Dharwar, in Appeal No. 44 of 1911.

Hindu Law—Alienation—Widow—Sale by Hindu widow assented to subsequently by daughter by unregistered deed—After death of widow and daughter latter's heir suing to set aside alienation on ground of want of legal necessity—Alienation held to be valid and binding on daughter's heir—Writing of consent held not compulsorily registrable under Registration Act, S. 17 (d).

A Hindu widow having a life-estate in certain property sold it. The then heir was her daughter who assented to the alienation a few days after the sale by an unregistered writing. After the death of the widow and the daughter, the heir of the latter sued to set aside the alienation on the ground that it was without legal necessity.

Held. (1) that no question of legal necessity could arise on the facts;

(2) that the writing by which consent was given was not compulsorily registrable under S. 17, Cl. (d), Registration Act, because all that the daughter had at that time was a spes successionis as heir;

(3) that consequently the alienation was valid and binding on the daughter's heir.

[P 188 C 1]

V. V. Bhadkamkar—for Appellant.

G. S. Mulgaonkar—for Respondent.

Judgment.—In 1891, a widow with the life estate, Irawa, sold the plaint property to the defendants. The then heir was the daughter of her deceased husband, Gurushidawa. Thirteen days after the sale, Gurushidawa assented to it. The only difficulty that could have arisen in the case would have lain in proving the consent of Gurushidawa. That has been done by a writing. The Courts below appear to have doubted whether such a writing could be admitted without registration. Looking to the terms of the writing, however, it appears to us that it is clearly outside and beyond the scope of S. 17, Cl. (d), Registration Act. All that Gurushidawa had at that time was a spes successionis as heir. In the writing, she purports to convey nothing but merely gives her consent to the alienation by her mother which amounts to this. She says: "If I should happen to survive you, I will not endeavour to set aside the alienation which you have made and I will ratify it." In point of fact, she did survive her mother by one day. Now her daughter's husband seeks to set aside the alienation on the ground that it was without legal necessity. No question of that kind, we think, can arise, the facts being as we have just stated them.

The legal point is completely covered by the authority of *Bajrangi Singh v. Manokarnika Bakhsh Singh* (1), a decision of the Privy Council.

We therefore think that the decree of the lower appellate Court must be reversed and the plaintiff's claim dismissed with all costs throughout upon him.

G.P./R.K.

Decree reversed.

(1) [1908] 30 All. 1=35 I A 1=5 A L. J. 1=9 Bom. L. R. 1348=6 C. L. J. 765=17 M. L. J. 605=3 M. L. T. 1 (P.C.).

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MACLEOD, J.

In re Subrati Jan Mahomed—Applicant.

Original Civil Appln. Decided on 4th December 1912.

Presidency Towns Insolvency Act (1909), Ss. 13 (8), 15 (2) and 21 (1)—Adjudicated insolvent cannot withdraw his petition on

ground that he has settled with his creditors—S. 13 (8) and S. 15 (2) apply to petitions pending before order is made—For purposes of S. 21 (1) debts must be paid in full and antecedent conduct must be such as to justify Court's discretion in insolvent's favour—Presidency Towns Insolvency Act (1909), Ss. 15 (2) and 21 (1).

An adjudicated insolvent cannot be allowed to withdraw his petition on the ground that he has settled with his creditors, inasmuch as sub-S. (8), S. 13 as well as sub-S. (2), S. 15 of the Act apply only to petitions which are pending before any order has been made, while to bring the case under S. 21 (1) the debts of the insolvent applicant should have been paid in full and also his antecedent conduct would have been such as to justify the Court to exercise its discretion in his favour. It would not be good exercise of discretion to make an order of annulment where, if the insolvent were applying for his discharge, an order of discharge would not be granted.

[P 189 C 1]

H. U. Patel—for Applicant.

Judgment.—This is an application on behalf of an adjudicated insolvent that he should be allowed to withdraw his petition on the ground that he has settled with his creditors.

Counsel referred to S. 15, sub-S. (2), Presidency Towns Insolvency Act (3 of 1909), but that subsection as well as sub-S. (8), S. 13, only apply to petitions which are pending before any order has been made.

Once an order of adjudication has been made, the debtor who presents his own petition, or the respondent in the case of a creditor's petition becomes an insolvent, and remains so until the order of adjudication is annulled or he obtains his discharge.

The Court has no jurisdiction to annul the order of adjudication except in the manner provided for by the Act. Under S. 21 (1), the order can be annulled if the Court is of opinion that the debtor ought not to have been adjudged insolvent, or if it is proved to the satisfaction of the Court that the debts of the insolvent have been paid in full.

This clause is the same as S. 35 (1) English Bankruptcy Act of 1883. In *In re Keet; Ex parte Official Receiver* (1), it was held that to satisfy that section the "debts" including at least all debts which have been actually and properly proved in bankruptcy must have been fully paid in cash.

(1) [1905] 2 K. B. 666=74 L. J. K. B. 694=93 L. T. 259=54 W. R. 20=12 Manson 235=21 T. L. R. 615.

Under S. 22, the order may be annulled if insolvency proceedings are pending in any other British Court.

Under S. 30, the order shall be annulled if the Court approves of a proposal for a composition or for a scheme of arrangement.

Under the Insolvency Act, a practice had been established in this Court of allowing an insolvent to apply for leave to withdraw his petition on serving notices on all his creditors in the schedule, and if no creditor appeared to oppose the application, leave was granted as a matter of course.

The Court did not concern itself with the conduct of the insolvent or the manner in which he had settled the claims of his creditors.

It is now the duty of the Court to scrutinize the conduct of every insolvent who applies either for an order of discharge or for the annulment of the adjudication order. Under S. 21, the Court has a discretion to make an order of annulment, and when the ground on which the application is made is the payment of the debts in full, it is entitled not only to be satisfied that, as a matter of fact, the debts have been fully paid in cash, but also to take into consideration the antecedent conduct of the debtor, since it would not be a good exercise of that discretion to make an order of annulment where, if the insolvent were applying for his discharge, an order of discharge would not be granted: see per Stirling, L. J., in *In re Keet; Ex parte Official Receiver* (1). When a proposal is made by an insolvent for a composition or a scheme of arrangement, provision has been made by Ss. 28 and 29 that the proposal should be placed before the creditors in the prescribed manner, whereby the statutory majority of creditors can bind the minority, and all creditors receive equal treatment, thus preventing one or more creditors from refusing to accept the debtor's proposal except on preferential terms. Moreover, before the Court approves of the proposal, it is bound to consider the conduct of the insolvent.

This application must be refused. That it ever was made seems to be due to a failure to comprehend the change introduced by the Insolvency Act, 1909.

G.P./R.K.

Application refused.

A. I. R. 1914 Bombay 189

BATCHELOR AND SHAH, JJ.

Emperor—Prosecutor.

v.

Hari Das Lakhmidas—Accused.

Criminal Appeal No. 204 of 1913, Decided on 31st July 1913, from order of acquittal passed by First Class Magistrate, Thana.

Coasting Vessels Act (1838), Ss. 13, 4, 7 and Schedule—Accused, his brother and father joint family members—Harbour craft registered in father's name alone—After father's death no second certificate of registry—Accused plied craft for hire—Accused held to have committed offence under S. 13 and that father's death constituted change of ownership under Ss. 4 and 7 of the Act.

The accused, his brother and his father were members of a joint Hindu family and they owned a harbour craft which however was registered under the provisions of the Coasting Vessels Act (19 of 1838), in the name of the father alone. After the death of the father, a second certificate of registry was not obtained by the accused who plied the craft for hire.

Held: that the accused had committed an offence under S. 13, Coasting Vessels Act, as the father's death constituted a change in the ownership of the craft under Ss 4 and 7 of the Act and the Schedule appended to it,

[P 190 C. 11]

S. S. Patkar—for the Crown.

K. H. Kelkar—for Accused.

Judgment.—This is an appeal by the Government of Bombay against the acquittal of one Haridas Lakhmidas who was accused of having committed an offence punishable under S. 13, Coasting Vessels Act 19 of 1838, in that, being the owner of a harbour craft, he plied the craft for hire without getting the certificate of registry required by Ss. 4 and 7 of the Act.

It appears that Haridas Lakhmidas, the accused, and his brother and father were members of a joint Hindu family, and the craft was registered in the name of the father Lakhmidas Kurji, who died in June 1912. Under S. 4 of the Act, a second registration is required whenever any change takes place in the name of the owner of any harbour craft. The learned Magistrate however who tried the accused, acquitted him on the ground that in this case the necessity for a second registration was avoided inasmuch as the business now conducted by the son, the accused, retained the name of the father, Lakhmidas Kurji. Mr. Kelkar, who has endeavoured to support the learned

Magistrate's judgment, has put it upon the ground that the real owners of the craft, when it was registered in the name of the father were the father and the two brothers and that the father's death does not constitute a change in the ownership of the craft. It appears to us however that the words of the Act are too clear to admit of any such construction as this. Ss. 4 and 7 of the Act and the Schedule appended to it seem to us to show that the Act requires the certification of a certain individual or individuals as being the owner or owners of the harbour craft. In this case admittedly, the craft was registered in the name of the father Lakhmidas. According to the schedule therefore it was certified that Lakhmidas was the sole owner of this craft. When Lakhmidas died in June 1912, he was no longer the sole owner of the craft, and it follows that there was a change in the ownership of the craft which, previously owned by Lakhmidas, was now owned by the present accused. That being so, it was, in our opinion, incumbent upon the accused under S. 4 of the Act to take out another registration. Since he did not do so, he is liable to the penalty prescribed by S. 13 as the punishment for an owner of a harbour craft who is guilty of this omission. The result is that under that section the accused, who must be convicted of the offence imputed to him, is subject to a fine of Rs. 10, and following the decision of *Empress v. Mhasnya Rama* (1), we direct that he pay this fine of Rs. 10.

G.P./R.K.

Appeal allowed.

(1) [1888] 7 Bom. 280.

A. I. R. 1914 Bombay 190

MACLEOD, J.

*In re Pioneer Bank, Ltd.**(In re Chainrai Veleran—Petitioner.)*

Original Civil Petn., Decided on 28th February 1914.

Companies Act (1882), S. 128—Petition for winding up company by shareholder must allege one of the grounds mentioned in S. 128—Allegations of any other grounds do not satisfy requirements of Act.

In S. 128, Companies Act, the first four grounds for winding up a company are specific and any other ground alleged under (e) must be of a like nature to those given under headings (a) to (d). A petition by a shareholder for winding up stands on a different footing to a petition by a creditor. It should be more

clearly scrutinized on presentation. The usual ground for a creditor's petition would be that the respondent-company is unable to pay its debt, and in such a case the company must pay the debt or submit to a winding up order. A shareholder's petition must, as a general rule, allege one of the grounds under headings (a), (b), (c) and (d) or any ground which the Court is satisfied is of a like nature to those in S. 128, and if any of those grounds are alleged, the Court will, under ordinary circumstances, admit the petition. If any other grounds are alleged the petition does not satisfy the requirements of the Act. [P 191 C 1, 2]

(b) Companies Act (1882)—Court may in discretion refuse to admit petition for winding up or give company notice of presentation of petition in order to restrain petition proceedings.

There is nothing in the Act or Rules which deprives the Court of the discretion which it has in every other case so that the Court may, if it thinks fit, refuse to admit a petition, or, as an alternative course, give the company concerned notice that a petition has been presented, so that it may take proceedings to restrain the petitioner from proceeding with his petition. [P 191 C 2]

(c) Companies Act (1882), S. 128—Petition by shareholders containing allegations as to internal management of company—Court cannot interfere in matter.

Where the petition by a shareholder contains allegations which all relate to the internal management or mismanagement of the company's affairs, it is a matter for the shareholders themselves to deal with, and not one that would call for interference by the Court. [P 191 C 1]

Judgment.—This petition was presented on 29th November 1913 under the Companies Act 6 of 1882, praying that the Pioneer Bank should be wound up. It came on for hearing before me on 17th January and I adjourned it in order to enable the shareholders of the bank to meet and ascertain whether they should continue the business or pass resolution for the voluntary winding up of the bank. The shareholders have now decided to continue the business and therefore the petition stands dismissed for this reason: that it does not comply with the provisions of S. 131, Companies Act, which states that the petition must allege facts which, if proved, will justify an order for winding up the company. S. 128 enacts the circumstances under which a company may be wound up by the Court:—

(a) Whenever the company has passed a special resolution requiring the company to be wound up by the Court.

(b) Whenever the company does not commence its business within a year

from its incorporation or suspends its business for the space of a whole year.

(c) Whenever the members are reduced in number to less than seven.

(d) Whenever the company is unable to pay its debts.

(e) Whenever for any other reason of a like nature the Court is of opinion that it is just and equitable that the company should be wound up.

The first four grounds for winding up a company are specific, and any other ground alleged under (e) must be of a like nature to those given under headings (a) to (d). The allegations in the petition all relate to the internal management or rather mismanagement of the company's affairs and that is a matter for the shareholders themselves to deal with. It is not a matter that would call for interference by the Court; so this petition is not in accordance with the provisions of the Act, and if it had been presented to me, I should have declined to accept it. There is no obligation whatever on the Court to admit a petition merely because it is presented. In the first place it must, as I have already stated, allege facts which, if proved, would justify an order for winding up a company and therefore perusal is necessary. But even if a petition does allege such facts, then the Judge has a discretion, since the admission of the petition must inevitably damage the credit of the company concerned, to consider whether it really is a bona fide one. Otherwise the door would be laid open to unlimited opportunities for blackmail, especially in times of financial panic. For a discontented shareholder might cause serious, if not irreparable, damage to a company by presenting a petition which, if the Judge were bound to accept it, would, under R. 636, have to be advertised in the newspapers 14 days before the hearing with the result that the company would have to close its business for the time, as no director would dare to authorize payments being made which he might be liable to refund in the case of a winding up order being passed.

In this case, the petitioner is a shareholder for ten shares, on which Rs. 100 have been paid up and on which there is a liability of Rs. 150. It is difficult to conceive that the petitioner was actuated by proper motives in presenting

his petition, which, if successful, would most probably result, so far as he was concerned, in his being called upon to pay another Rs. 150. A petition by a shareholder stands on a different footing to a petition by a creditor. It should be more closely scrutinized on presentation. The usual ground for a creditor's petition would be that the respondent-company is unable to pay its debts, and in such a case the company must pay the debt or submit to a winding up order. A shareholder's petition must, as a general rule, allege one of the grounds under headings (a), (b), (c) and (d) or any grounds which the Court is satisfied is of a like nature to those in S. 128, and if any of those grounds are alleged, there is little doubt that the Court, will, under ordinary circumstances, admit the petition. If any other grounds are alleged the petition does not satisfy the requirements of the Act. The procedure provided by the Act and the Rules on the presentation of petitions for winding up do not seem to my mind to be as clear as they ought to be, and I therefore take the opportunity of pointing out that, in my opinion, there is nothing in the Act or Rules which deprives the Court of the discretion which it has in every other case, so that the Court may, if it thinks fit, refuse to admit a petition, or, as an alternative course, give the company concerned notice that a petition has been presented, so that it may take proceedings to restrain the petitioner from proceeding with his petition.

In this case the company has not pressed for costs against the petitioner, as I am told such an order would be valueless to them, the petitioner not being a man of any means, and therefore it has consented to the petition being dismissed without costs; otherwise, I should have made the petitioner pay its costs.

G.P./R.K.

Petition dismissed.

A. I. R. 1914 Bombay 192

BEAMAN AND HAYWARD, JJ.

Narandas Vrijbukhandas and others—
Defendants—Appellants.

v.

*Bai Saraswati and others—*Plaintiffs
—Respondents.

Second Appeal No. 527 of 1913, Decided on 29th June 1914, from decision of Dist. Judge, Ahmedabad, in Appeal No. 560 of 1911.

(a) Will—Construction—Intention of testator must be given effect to.

In construing wills the Courts must look at and give effect to the intention of the testator. [P 193 C 1]

(b) Will—Construction.

A will gave first a life-estate to the testator's widow and on her death a life-estate to his daughter and further provided that in the event of the daughter having a male child he was to take the whole estate of the testator on attaining the age of 18 and that the testator's cousins, who were appointed general executors of the will and also trustees for the minor son of the testator's daughter, were to get the estate absolutely should the daughter die without male issue.

Held: that the dominant intention of the testator after providing a suitable life-estate for his widow was to give the whole of his property to his grandson and in the event of that being defeated, his intention was to retain the estate in his own family and therefore the daughter could not get the estate absolutely. [P 193 C 1]

G. N. Thakor—for Appellants.

M. K. Mehta—for Respondents.

Judgment.—In this suit the plaintiff, Bai Saraswati, daughter of the testator, Mahasukhram, sued on behalf of herself and her minor son for the construction of a will. It has been contended on behalf of the appellants, the cousins of the deceased testator, that the minor has not been properly represented in this litigation since his interests are manifestly in conflict with those of his natural mother, Saraswati. In the view we take however we think that it is impossible that the minor could be prejudiced. It has not been contended here, and we think that it could not be contended, that upon any construction of the will the minor would obtain any portion of the estate, nor is he under the Hindu law an heir to the deceased in the event of there being an intestacy. The minor therefore has clearly no real interest in this suit. The contest lies between Saraswati, who in the event of an intestacy

would take the whole estate, and the cousins of the deceased Mahasukhram, who are the appellants here.

Both the lower Courts have found that upon a proper construction of the will there is an intestacy, and that the daughter Saraswati is therefore entitled to the whole estate. We think the learned Judges below were in error. The will is the work of an inexperienced layman, and it would be unreasonable to look for too great technical accuracy in its composition. But reading it as a whole we can feel no doubt as to the general scheme of the will and what the real desire and intention of the testator were. Briefly the will provides first a life-estate for his widow, Parvati. She has since died. Next the will provides that on the death of Parvati, his daughter Saraswati should have a life-estate of Rs. 150 and the rent of a house. In the event of his daughter Saraswati having male children or a male child, that male child (or possibly male children, if there should be more than one) is or are to take the whole estate of the testator on attaining the age of 18, and then bearing a good character. Presumably, if Saraswati should then have been surviving, the testator's intention was that her sons should provide for her, as no provision appears in the will for the continuance of her maintenance after her male issue should have attained the age of eighteen years and at that time borne a good character. The appellants' cousins or, as they are called in this will sometimes, brothers of the deceased testator, are the general executors of the will and trustees of the life-estates provided in the will, and also trustees for the minor male son or sons of Saraswati until they should attain the age of 18. Then follows a clause which has given rise to the main contest in this suit, and that is, that should Saraswati have no male issue, then, on her death, that is to say, on the termination of her life-estate, the whole of the testator's estate is to go to the appellants, his cousins, absolutely.

Now Saraswati bore no male child during the lifetime of the testator. The intended bequest therefore to her male issue, should she have any, fails under the rule in the *Tagore* case: *Jotindra Mohan Tagore v. Ganendra*

Mohan Tagore (1). After the death of the testator she has had male issue, and her son, the minor in this suit still lives. It has therefore been contended, and that contention has prevailed in both the Courts below, that by reason of the apparent condition, namely should Saraswati have no sons (that condition not having been fulfilled) the appellants cannot take after the death of Saraswati, and since the intended bequest to the son actually in existence cannot take effect either, there is an intestacy. We are entirely unable to accede to this contention. What we are to look at and, if we are able to ascertain, give effect to, is the intention of the testator. In doing so we must be governed by general principles such as are to be found stated in cases like that of *Jones v. Westcomb* (2) and many others in the English Law Reports. Now here it is perfectly clear that the dominant intention of the testator, after providing a suitable life estate for his widow, was to give the whole of his property to his grandson. That intention has unhappily been defeated as no grandson was alive at the date of his death. Failing this it is equally clear that his dominant intention was to retain his estate in his own family, that is to say, in the hands of the appellants, his cousins. To the best of his ability he appears to us to have carefully guarded against the effect of there being an intestacy, namely his estate passing absolutely into the hands of his daughter Saraswati.

Nor do we think that so literal and strict a construction ought to be put on the condition annexed to the appellants' taking the estate after the death of Saraswati. That this could not have been the testator's intention is perfectly clear from other clauses in the will. Thus he expressly annexed a condition in the event of his grandson taking the estate that the boy shall attain the age of 18 and shall be of good character. Clearly then if the will is to have any meaning he must have contemplated the possibility of his grandson, should any such have been in existence at his death,

not attaining the age of 18 or not being of good character at that time, and in either event, although this is not actually expressed, it would be equally clear that he meant the appellants to take the estate after the death of Saraswati precisely as though no son had been born to her. In our opinion therefore it would clearly defeat the intention of the testator, were we to adopt the view that in the events which have happened there has been an intestacy and so give the whole estate to Saraswati. As between her and appellants it is clear beyond all possibility of argument that the testator preferred the appellants, and desired that they should take the whole estate after having provided a suitable maintenance for Saraswati during her lifetime; nor can we find anything upon a reasonable construction of the will as it stands, in the events which have happened, to preclude us from giving effect to that intention. In our opinion, therefore the decree of the lower appellate Court must be reversed, and it must now be declared that Saraswati is entitled to the life-estate reserved to her upon the condition stated in the will, and that thereafter the appellants are entitled to take the whole estate. All costs to come out of the estate.

G.P./R.K.

Appeal accepted.

A. I. R. 1914 Bombay 193

DAVAR, J.

Mt. Jankibai—Plaintiff.

v.

Shrinivas Ganesh Valsankar and others—Defendants.

Original Civil Suit No. 313 of 1910.
Decided on 27th March 1913.

(a) **Hindu Law—Joint family—Member possessing joint property on death leaves no estate—Surviving coparceners do not claim as heirs—They become owners of his interest in their own right.**

When a member of a joint Hindu family, possessing only joint ancestral property dies he leaves no estate, and surviving coparceners do not inherit any estate as his heirs. They become the owners of his interest in the family estate as co-owners in their own right and merely by the legal extinction of the deceased's interest by reason of his death. [P 195 C 1]

(b) **Civil P. C. (1908), O. 2, R. 5—Hindu widow suing coparceners of deceased husband in one suit to recover: (1) stridhan property detained, and (2) to enforce right to**

(1) [1872] 9 B. L. R. 377=18 W. R. 359=I.A. Sup. Vol. 47=2 Suth. 692=3 Sar. 85.

(2) [1711] 1 Eq. Cas. Abr. 245=Proc. Ch. 316=Gilb. Eq. R. 74=21 E. R. 1022.

**maintenance out of joint family property—
Held no misjoinder of causes of action.**

There is no misjoinder of causes of action if a Hindu widow sues, in one suit, the coparceners of the deceased husband to recover: (1) her stridhan property, improperly or illegally detained by them, and (2) to enforce her right of maintenance out of the estate of the joint family, of which during his lifetime her husband was a member. [P 195 C 1]

Pradhan and Kirtlikar—for Plaintiff.

Bhandarkar and Mirza—for Defendants.

Judgment.—The plaintiff Jankibai is the widow of Vithal Valsankar, who died in 1907. He left him surviving his widow, the plaintiff herein, and his five brothers who are all defendants in this suit. The six brothers were members of a joint and undivided Hindu family and it is admitted that they were owners of joint ancestral properties, consisting of houses and lands, which are in Akalkote in the Sholapur District. These properties are now in the possession of the defendants.

The plaintiff has filed this suit to recover from the defendants her stridhan ornaments which, she says, she left with her husband's brothers when she left their house, and she claims maintenance and arrears of maintenance out of the joint ancestral property now in the possession of the defendants. These claims are resisted on various grounds which for the present purposes are unnecessary to set out.

The defendants contend that this suit as framed is bad for misjoinder of causes of action.

Issue 1 raised by the learned counsel for the defendants is:

"Whether the suit is not bad for misjoinder of causes of action."

It was argued in support of the contention that the claim for ornaments is against the defendants personally and could not be joined with the claim for maintenance which is against the defendants as the heirs of plaintiff's husband, and reliance was placed on the provisions of O. 2, R. 5, Civil P. C.

At the hearing, it was agreed that the issue as to misjoinder should be tried in the first instance.

Order 2, R. 5, re-enacts R. (b), S. 44, of the old Civil P. C. It says that no claim by or against an executor, administrator or heir as such shall be joined with claims by or against him personally. Although this question had

repeatedly arisen, there is no reported case except one where it was specifically raised and decided. In *Gokibai v. Lakhmidas Khimji* (1), wherein a Hindu widow sued her father-in-law, for maintenance, this question was raised before the late Scott, J., and he held that the suit was bad by reason of misjoinder of causes of action and the plaintiff was put upon her election to proceed upon one or the other of the two claims made by her in the suit. Though the case itself is of some importance on the other questions arising in the suit, the report is exceedingly meagre on this particular point. As I am not prepared to follow the conclusion arrived at by the learned Judge in that case, I think it is desirable to set out here all that the report says on the subject. It says:

"On behalf of the defendant an issue was raised as to whether the plaintiff had not improperly joined her claim for maintenance and her claim for ornaments and clothes in this suit and was not bound to elect which claim she would prosecute. The learned Judge held that under S. 44, Civil P. C. (Act 14 of 1832) there was a misjoinder of causes of action, the claim for maintenance being against the estate of the deceased, and the claim for ornaments and clothes being against the defendant personally."

Unfortunately, it does not appear from the report what arguments were addressed to the Court, nor is there any judgment setting out the reasons for the decision beyond what is stated by the reporter in the extract I have quoted above. It seems to me that the conclusion of the Court in the case in question is based on the fallacies involved in the assumption that there was, at the time the widow made the claim, any estate which can be rightly called the estate of her deceased husband and also in the assumption that the surviving coparceners of a joint and undivided Hindu family can be properly called the heirs of a deceased coparcener. Members of a joint and undivided Hindu family hold family estate jointly and are seised of it "*per mie et per tout*." The joint tenants have each of them the entire possession as well of every parcel as of the whole.

(1) [1890] 14 Bom. 490.

On the death of a coparcener of a joint Hindu family, his share and interest in the family property is automatically absorbed and the surviving coparceners become the full owners of the whole estate. Such coparceners are not the heirs of the deceased. They inherit by survivorship. They become the owners of the interest of the deceased in the family estate not as heirs of the deceased, but as co-owners in their own right and merely by the legal extinction of the interest of the deceased coparcener by reason of his death. The widow's claim for maintenance is clearly not against "the estate of the deceased" husband but is against the property in which he was a coparcener at the time of his death. When a husband, who is a member of a joint Hindu family possessing only joint ancestral property, dies, he leaves no estate and the coparceners do not inherit any estate as his heirs.

In this case, the defendants are not in any sense the heirs of the plaintiff's husband. The plaintiff's husband has left no estate. The plaintiff's claim for maintenance is not against her husband's estate nor is it against the defendants as the heirs of her husband as such.

As I have observed above, the identical question, I am now discussing, has frequently arisen in our Court and *Gokibai's* case (1) has always been cited and discussed but the results have been in most of these cases unsatisfactory and inconclusive. Some Judges have followed the ruling of Scott, J., but in many instances the Judges have refused to follow it either dissenting from it or distinguishing the case before them from this particular case. After much anxious consideration, I have come to the conclusion that there is no misjoinder of causes of action if a Hindu widow sues in one suit the coparceners of her deceased husband to recover her stridhan property improperly or illegally detained by them and also to enforce her right of maintenance out of the estate of the joint family of which during his lifetime her husband was a member.

It has not been argued before me that the suit is bad for misjoinder of causes of action on any ground other than the prohibition enacted in O. 2,

R. 5. O. 1, R. 3, provides for joinder of parties and O. 2, R. 3, provides for joinder of causes of action and both these questions have been fully considered and discussed by me in my previous judgments in *Mavji v. Kuverji* (2) and in *Umabai v. Bhavu Balavant* (3).

I find the first issue in the negative and hold that the suit as framed is not bad by reason of misjoinder of causes of action.

The suit will be put down on board for further hearing subject to a part-heard suit. I will deal with the question of costs of the trial of this issue when I deal with the costs of the suit

G.P./R.K. *Order accordingly.*

(2) [1907] 31 Bom. 516=9 Bom. L. R. 482.

(3) [1910] 34 Bom. 358=3 I. C. 165.

A. I. R. 1914 Bombay 195

DAVAR, AG. C. J., AND HEATON, J.
Champsey Bhimji & Co.—Defendants
—Appellants.

v.

Jamna Flour Mills Co., Ltd.—Plaintiffs—Respondents.

Original Civil Appeal No. 27 of 1914 and Civil Suit No. 572 of 1914, Decided on 26th June 1914, from judgment of Macleod, J.

Civil P. C. (1908), O. 39, R. 2—Mandatory injunction can be granted on interlocutory application.

A Court has power to remedy an injury or wrong by a mandatory injunction on an interlocutory application. [P.197 C 1]

Setalvad and *Desai*—for Appellants.

Jardine—for Respondents.

[Facts appear from the following judgment of Macleod, J.:—Plaintiffs are the lessees of certain premises for the unexpired period of a term of 99 years from 1st April 1905 except the last 11 days thereof. The defendant lessors had covenanted to make and construct within one month from the date of the lease, and at their own expense keep and maintain, two pucca roads, each of the width of 40 ft.: the one leading from Mount Road to the premises leased to the plaintiffs and the other from the Rose Cottage Lane as shown in the plan annexed to the lease. The lessees were to have complete right of way and access thereon, for themselves and their agents and for carts, vehicles, etc., at all times and for all purposes.

The lessors in May last blocked up the road leading from the gate in the

plaintiff's premises to Rose Cottage Lane, as shown in the photographs exhibited in this motion. Plaintiffs now ask me to grant an injunction restraining the defendants from keeping any debris on the road and from raising the level thereof to a greater height than before, so as to prevent the plaintiff's from making use of it as before. It is quite clear from the affidavits in this case that the defendants have at present, in breach of their covenant, prevented plaintiffs from having access to the road leading from the premises leased to the Rose Cottage Lane.

The defendants rely upon two grounds on which they object to the Court making any order. They first say that the plaintiffs have consented to the raising of the level road. They seem to rely upon a letter of the plaintiff's secretary of 19th March 1914. There is no justification in that letter for the defendant's contention. It runs thus:

"We wish to draw your attention to the improvements being carried on in Rose Cottage Lane. We notice that this road will be raised considerably and will necessitate some alteration in the road leading from our mill on to Rose Cottage Lane. The mill road is in a very bad state at present and we shall be obliged if you will arrange to repair it, and at the same time raise the level to that of Rose Cottage Lane.

"Unless this is done before the monsoon we are afraid we shall have great difficulty in getting loaded carts out of the mill compound."

There is no room for any doubt regarding the construction of this letter. No one in his senses could have thought that Mr. Ingham meant by that letter that the defendants might raise the level of their road throughout the length to the level of the Rose Cottage Lane, thereby entirely blocking the plaintiff's means of access to that road unless the plaintiffs built a ramp on their own premises. That the defendants did not put this construction on that letter becomes quite clear when I turn to their letter of 2nd June, when they write therein: "If you require any slope for your convenience and purposes you can do it inside the compound of the mill." Defendants having blocked up the plain-

tiff's means of egress by the south gate calmly suggest that if the plaintiffs required any slope for their convenience inside the compound of their mill they might make it themselves. The evidence of defendant's witnesses, that they heard Mr. Ingham and other employees of the plaintiffs say that plaintiffs would make the slope inside the premises, is an obvious fabrication. Secondly, the defendants contend that the Court has no power to make the order granting direct relief pending the hearing of the action. I do not think that so wide a limitation of the power of the Court exists. There must be an injunction restraining the defendants from further raising the level of the road, but I have no doubt that this Court has power to grant also an injunction restraining the defendants from keeping the road at its present level so as to prevent the plaintiffs from making use of the road for taking their carts out through the south gate. Cases in which the Court will make what is in effect a mandatory order on an interlocutory application may be rare, but the Court has, in my opinion, power to make such an order before the suit is heard. It does not make much difference whether the order is made under O. 39, R. 2, or under S. 151. It cannot be that, when one party to a contract of lease has covenanted to allow certain means of ingress and egress, the Court should have no power to interfere, before the action is heard, to prevent the first party from breaking his covenant. If the defendant's contention were correct, they might block up both the gates so as to confine the plaintiffs to their premises until the suit has been decided.

The injunction will go in this form: "The defendants, until the hearing of this suit, are restrained from obstructing the plaintiff's right of way and access to the road leading from their south gate to the Rose Cottage Lane."

Davar, Ag. C. J.—In this appeal we do not think it necessary to trouble the learned Advocate-General to reply on behalf of the plaintiffs. The two grounds urged before us in support of the appeal are, firstly, that this Court has no power to make an order of a mandatory nature on an interlocutory application, and secondly, on the merits that this order should not have been made.

Having regard to the very clear wording of O. 39, R. 2, and to the fact that this Court has always exercised the power of remedying an injury or wrong by a mandatory injunction on an interlocutory application, I have no doubt whatever that this Court has power to make a mandatory order on an interlocutory application. If the Court had no such power it would be in the power of a party to cause insufferable inconvenience and grave injury to another during the whole time that would elapse between the commission of the wrongful act and the hearing of the suit filed to remedy the wrong and redress the injury.

Then as to the merits, it is desirable to say as little as possible as the whole matter remains to be investigated before Macleod, J., on 6th July. It would be sufficient for us to say that an order on an application of this kind is purely within the discretion of the learned Judge who hears the application.

We have had read to us all the affidavits filed on this application and are not prepared to say that the discretion of the learned Judge was not in this instance exercised soundly and properly, and under the circumstances we see no reason whatever to interfere with the order made by the learned Judge.

As to expediting the suit, the learned counsel for the respondents says that he agreed only on condition that an injunction was not granted. The regulation of the hearing of suits is entirely within the power of the Chamber Judge or the Judge to whom the suit is assigned for interlocutory applications, and the learned Judge in the Court below was entitled to make this order for an early hearing, quite independently of the parties' consent.

Heaton, J.—I only wish to add that whatever view may be taken of the general question of mandatory injunctions under O. 39, R. 2, I think this injunction must be maintained. It is in form a restraining injunction and though in effect it may require the defendant to undo some part of that which he has already done, I do not think its effect is such as to pass outside the kind of relief which, I believe, is intended to be given by R. 2, O. 39. I speak having regard to the particular facts of this particular case.

Appeal dismissed with costs, including costs of the application of 23rd June 1914.

G.P./R.K.

Appeal dismissed.

A. I. R. 1914 Bombay 197

HEATON AND SHAH, JJ.

Rup Chand Makandas—Plaintiff.

v.

Mukunda Mahadev—Defendant.

Civil Ref. No. 15 of 1913, Decided on 7th April 1914, made by Addl. First Class Sub-Judge, Dhulia, in Small Cause Suit No. 473 of 1913.

(a) **Dekkhan Agriculturists' Relief Act (1879), Ss. 47 and 48—Conciliation system abolished after grant of certificate and during vacation—Suit filed on day of Court opening—Time in obtaining certificate can be deducted.**

Where a conciliator's certificate was obtained under the Act, and before the suit was filed, the Court was closed for the summer vacation, during which the conciliation system was abolished and the period of limitation expired.

Held: that the plaintiff was entitled to deduct the period between his application and the grant of certificate and was within time in bringing his suit on the opening day after the vacation. [P 198 C 1]

(b) **Practice—Limitation — Law excuses party who cannot conform to limitation created by law without default in him.**

When the law creates limitation and the party is disabled to conform to that limitation without any default in him, and he has no remedy over, the law will ordinarily excuse him. [P-198 C 1]

Judgment.—On the facts stated in the reference, we are clearly of opinion that the suit is not time barred.

The plaintiff applied for a certificate and obtained it at a time when the conciliation system was in existence and when under the provisions of the Dekkhan Agriculturists' Relief Act it was incumbent upon him to obtain such a certificate. He could have filed the suit in time and claimed the benefit of S. 48, Dekkhan Agriculturists' Relief Act, had it not been for the fact that the Court was closed for the summer vacation from 28th April to 8th June 1913. He filed the suit on the opening day after the vacation. The accident of the Local Government having cancelled the appointments of the conciliators on 10th May with effect from 30th May 1913 cannot make any difference in the plaintiff's position. The suit, though filed on 9th June when the conciliation system was abolished, was substantially one to which the provisions of Chap. 6, Dekkhan Agriculturists' Relief Act, were

applicable throughout the period of limitation which expired during the vacation. The plaintiff is accordingly entitled to deduct the period between his application and the grant of the certificate.

Assuming, however, that S. 48, Dekkhan Agriculturists' Relief Act, does not apply, as at the date of the suit there were no conciliators in the district, it is clear that the plaintiff's claim is still in time on another ground. On the facts the position is clearly this : that the plaintiff's suit would be strictly in time up to a certain date during the vacation, on which day he could not file it as the Court was closed. He could file it on the re-opening of the Court under S. 4, Limitation Act. But by the Government notification the whole position was changed, and it became impossible for the plaintiff to file his suit in time. It is clear that the law does not compel a man to do that which he cannot possibly perform. Under the circumstances, we think, the proper rule to apply is that when the law creates a limitation, and the party is disabled to conform to that limitation without any default in him, and he has no remedy over, the law will ordinarily excuse him. The facts in this case clearly entitle the plaintiff to be excused.

G.P./R.K. *Order accordingly.*

A. I. R. 1914 Bombay 198 (1)

HEATON AND SHAH, JJ.

Bhagubhai Dwarkadas and others—Applicants.

v.

Emperor—Prosecutor.

Criminal Revn. Appln. No. 269 of 1914, Decided on 17th August 1914, against order of Dist. Magistrate, Surat.

Criminal P. C., (1898), S. 144 (3)—Order under S. 144 is without jurisdiction if its operation is not confined to individual or public generally frequenting particular place.

An order of a District Magistrate, purporting to have been passed under S. 144, is made without jurisdiction if its operation is not confined to a particular individual or to the public generally when frequenting or visiting a particular place. [P 198 C 2]

Setalvad and Ratanlal Ranchhodas—for Applicants.

S. S. Patkar—for the Crown.

Shah, J.—The District Magistrate of Surat, purporting to act under S. 144, Criminal P. C., has made an order direc-

ting "all persons to abstain from removing or causing to be removed, or promoting, aiding, or abetting, directly or indirectly, in any way, the removal of any dogs, either in carts, or otherwise, and from preventing or trying to prevent or obstruct, directly or indirectly, the poisoning of such dogs in any way and from taking possession of or confining such dogs." It is mentioned in the order that "it applies to Surat city and all places within five miles of Surat city." Under S. 144 however the District Magistrate has power only to direct an order to a particular individual or to the public generally when frequenting or visiting a particular place. It is quite clear that this order complies with neither of these requirements. It is therefore made without jurisdiction. It is needless to consider the other objections urged on behalf of the applicants. On this ground alone I set aside the order.

Heaton, J.—I agree. I hold that the District Magistrate has no power whatever to issue a prohibitory order to the public, unless that power is specifically conferred by some provision of the law. He claims or appears to claim that the power to issue this particular prohibitory order to the public of Surat is conferred by S. 144. But to me it is quite plain that it is not. Cl. (3) of that section cannot conceivably cover the case, and the power to direct any person to abstain from a particular thing is not a power to direct the public generally from abstaining.

G.P./R.K. *Order set aside.*

A. I. R. 1914 Bombay 198 (2)

SCOTT C. J., AND BATCHELOR, J.

Dholka Town Municipality—Defendant—Appellant.

v.

Desaibhai Kalidas Patel—Plaintiff—Respondent.

Second Appeal No. 455 of 1912, Decided on 3rd September 1913, from decision of Dist. Judge, Ahmedabad, in Appeal No. 201 of 1930.

Tort—Negligence—Damages—Exemption from liability of local bodies on ground of nonfeasance does not apply to drainage works.

The exemption from liability of local bodies on the ground of nonfeasance is confined to neglect of highways, and does not apply to drainage works carried out by the local bodies for their convenience, which they are bound

to maintain in a proper state of repair so that they shall not be a nuisance to the neighbouring owners : (1879) 4 A. C. 256, *Foll.*

A drainage channel was built merely for the convenience of a Municipality who took it over. The drainage water, owing to some default, instead of flowing along the designed channel, flowed across the road into the plaintiff's field and caused damage to the plaintiff. The damage was found to be due, not to the authorized drainage work, but to the neglect of the channel.

Held: that the Municipality were liable in respect of the damage caused to the plaintiff. [P 199 C 1]

G. S. Rao—for Appellant.

N. K. Mehta—for Respondent.

Judgment.—Upon the findings of fact of the lower appellate Court, we are of opinion that the decision appealed from is right. The drainage water passing along a certain drainage cut owing to some default instead of flowing along the assigned channel flows across the road into the plaintiff's field and causes damage to the plaintiff. The damage is found to be due, not to the authorized drainage work, but to the neglect of the drainage channel, which the Municipality is bound to repair. The Government made the cut under their powers under the Irrigation Act, but it was built merely for the convenience of the Municipality, who took it over, and who are authorized under S. 56, District Municipal Act, to expend money on works outside the Municipal district. It is contended on behalf of the appellant that the Municipality are under no liability in respect of the damage caused to the plaintiff, because it is a matter arising from nonfeasance and not from misfeasance. But the exemption from liability of local bodies on the ground of nonfeasance is confined to neglect of highways, and does not apply to drainage works carried out by the local bodies for their convenience, which they are bound to maintain in a proper state of repairs so that they shall not be a nuisance to the neighbouring owners. This appears from the judgments of the Privy Council in *Bathurst Borough v. Macpherson* (1) and *Municipality of Pictou v. Geldert* (2). We, therefore, affirm the decree of the lower appel-

late Court and dismiss the appeal with costs.

G.P./R.K.

Decree affirmed.

A. I. R. 1914 Bombay 199

HEATON AND SHAH, JJ.

Bhau Savalaram Kotasthane—Accused—Applicant.

v.

Emperor—Prosecutor.

Criminal Revn. Appln. No. 154 of 1914, Decided on 20th September 1914, from order of Sub-Divl. Magistrate, Ahmednagar,

(a) Criminal P. C. (1898), S. 110—Inquiry under security proceedings progressing—Sending person to jail is illegal.

To send a person to jail while an enquiry under security proceedings is in progress is an illegality which prejudices his interests in the inquiry.

Therefore, such an enquiry can be said neither to be fair and conducted with that regard for the rights and privileges of the person against whom the proceedings are taken, which the law requires. [P 200 C 1]

(b) Criminal P. C. (1898), S. 110—Municipal Chairman proceeded against under S. 110—His detention in jail while inquiry in progress held to prejudice his interest—Evidence of general repute ought to be that acquired since his appointment.

Where the Chairman of the Managing Committee of a Municipality was proceeded against under S. 110, the proceedings being based on evidence of general repute and he was detained in jail pending the inquiry.

Held: (1) that the fact of detaining him in jail while the enquiry was in progress prejudiced his interests in the trial and rendered the inquiry unfair.

(2) That the evidence of general repute must in this case be evidence of a reputation which the accused had acquired since his appointment to the Chairmanship. [P 199 C 2]

G. S. Rao—for Applicant.

S. S. Patkar—for the Crown.

Heaton, J.—In this case we set aside the order requiring security from the applicant.

We do this in revision. It is said, and no doubt correctly said, that we seldom interfere in these matters in revision. But the circumstances here are very exceptional. The applicant was sent to jail whilst the inquiry was in progress, an illegal thing and one which, on the face of it, prejudices his interest in the inquiry. Therefore, we cannot but say in this case that the inquiry has not been a fair one. It has not been conducted with that regard for the rights and privileges of the person against whom the proceedings were taken, which our law requires.

(1) [1879] 4 A. C. 256=41 L. T. 778=49 L. J. P. C. 61.

(2) [1893] A. C. 524=63 L. J. P. C. 37=69 L. T. 510=42 W. R. 114.

On the merits of the case I only want to say one thing. There is evidence of general reputation. It appears, however, that the applicant was Chairman of the Managing Committee of the Municipality of Vambori. Now, when he came to be last appointed to that office, it ought to be evident that at that time his general reputation hardly could be that of a receiver of stolen property. And if evidence of general reputation is put forward in a case of this kind it must, so far as general reputation goes, almost inevitably be evidence of a reputation which has been acquired since the last appointment to an office of this kind, and, as such, it can be tested perhaps more easily than is usually the case with the evidence of that type.

For these reasons, I think the order requiring security must be set aside.

Shah, J.—I agree.

G.P./R.K.

Order set aside.

A. I. R. 1914 Bombay 200

SCOTT, C. J. AND BEAMAN, J.

Rama Tulsa Mahar—Plaintiff—Appellant.

v.

Bhagchand Motiram — Defendant—Respondent.

Second Appeal No. 261 of 1913, Decided on 31st July 1912, from decision of Addl. First Class Sub-Judge. Nasik, in Appeal No. 195 of 1912.

Civil P. C. (1908), S. 47—Mortgagee not applying for decree absolute in foreclosure suit—Relationship between mortgagor and mortgagee is not over—Mortgagor is not barred to file fresh redemption suit under S. 47 nor his suit is barred under Civil P. C. (1908), S. 11.

If a mortgagee does not apply in a foreclosure suit for a decree absolute, he does not get rid of the relationship of mortgagor and mortgagee. Therefore in such a case a mortgagor or his representative who was allowed in the suit six months' time to pay the decretal amount, is not barred by reason of S. 47 from filing a fresh suit for redemption, nor is his suit barred by S. 11, but he cannot go behind the decree in the mortgagee's suit in so far as it settles the amount of the mortgage-debt up to the date of that decree. [P 201 C 1]

K. N. Koyajee—for Appellant.

W. B. Pradhan—for Respondent.

Judgment.—The plaintiff claims to be the assignee of the equity of redemption of a certain mortgagor, named Chima, Chima's mortgage having been created on 17th June 1890 in favour of defendant 1. The assignment of the plaintiff is dated 2nd April 1902. Subse-

quent to that assignment the Court under the money-decree obtained against Chima in Suit No. 229 of 1902 at a Court-sale held in July 1906 put up to sale, the right, title and interest of Chima in this property which was attached by the decree-holder in that suit and at that sale the defendant-mortgagee was declared to be the purchaser.

Prior to that purchase defendant 1 had brought a suit upon Chima's mortgage for sale of the mortgaged property in 1905, and the plaintiff's father, who was Chima's assignee, was joined as a party to that suit. A decree was passed by which the defendants, including the plaintiff's father, were allowed six months' time to pay the money due under the mortgage, and in default the plaintiff was to recover the amount decreed by sale by applying for a decree absolute. He never applied for sale, but rested content with the title that he was supposed to have acquired as purchaser at the Court-sale held under the decree in the money suit of 1902.

The plaintiff now brings this suit for redemption of the mortgaged property, but the learned Judge has dismissed his claim on the ground that the time of six months allowed by the decree for making payment of the mortgage claim had long expired, and that this was an application in execution which should have been brought under S. 47, Civil P.C. and that a separate redemption suit could not lie. We are of opinion that the defendant in a suit for sale under a mortgage who is given six months' time to pay the decretal debt, is not in the position of a decree-holder who has a decree to execute. His right of payment within six months is a right which he has in mitigation of his liabilities under the decree. The contention of the defendant would result in this anomalous position that having the right to apply for sale and for decree absolute he abstains from exercising that right; yet nevertheless after three years have elapsed, though he can no longer enforce the decree, he is put in the position of absolute owner of the property by reason of the defendant in the suit not having elected to pay off the mortgage. We think that if he does not apply for decree absolute he does not get rid of the relationship of mortgagor and mortgagee, and there is nothing to

prevent the mortgagor or his representative from filing a suit for redemption. It has been held in England in *Hansard v. Hardy* (1) that a dismissal for want of prosecution of a mortgagor's action for redemption does not prevent him from bringing a fresh suit for redemption. A fortiori we think that his failure to pay the amount of the decretal debt within the six months allowed to him cannot, so long as the relationship of mortgagor and mortgagee subsists, prevent him from filing a fresh suit for redemption, subject, however, to this that he cannot go behind the decree in the mortgagee's suit in so far as it settles the amount of the mortgage debt up to the date of that decree. But it is not contended by the plaintiff in this suit that the mortgage debt at that time was less than it is found to be by the Court, and, therefore, in permitting the present suit, there would be no violation of the provisions of S. 11, Civil P.C. We reverse the decree and remand the case for disposal on the merits. The plaintiff must have the costs of the two appeals against the opposing defendants.

G.P./R.K.

Decree reversed.

(1) [1812] 18 Ves. 455 at p. 460=34 E. R. 389.

A. I. R. 1914 Bombay 201

HEATON AND SHAH, JJ.

Satyabhamabai Janardhan Khare — Plaintiff.

v.

Govind Janku Bade—Defendant.

Civil Ref. No. 2 of 1914, Decided on 7th April 1914.

(a) Dekkhan Agriculturists' Relief Act (1879), Ss. 47 and 48—Suit on bond—Conciliator's certificate under S. 47 not granted because of termination of conciliation system in district—S. 48 is not applicable.

In a suit on a bond in which it was necessary to file a conciliator's certificate under S. 47, where no certificate is granted in consequence of the termination of the conciliation system in the district, S. 48 has no application, and the period of limitation applicable therefore would be the period prescribed under the Limitation Act. [P 201 C 1]

(b) Dekkhan Agriculturists' Relief Act. (1879), S. 47—Time between application to the conciliator and termination of the conciliation system cannot be deducted in computing period of limitation—Period can be extended reasonably to file a suit in time.

The plaintiff would not be entitled to deduct the time between his application to the conciliator and the termination of the conciliation system, but he would be entitled to such ex-

tension of time as would be necessary to secure him a reasonable opportunity to file the suit in time. [P 202 C 1]

(c) Practice—Limitation—Law excuses party who cannot conform to limitation created by law without default in him.

Where the law creates a limitation and the party is disabled to conform to that limitation without any default in him, and he has no remedy over, the law would ordinarily excuse him. But this rule is subject to the limitation that it will excuse him so far as it is necessary and not beyond. [P 201 C 2]

S. S. Patkar—for Plaintiff.

G. S. Rao—for Defendant.

Judgment.—The facts are stated in the reference. The question submitted for our opinion is whether the plaintiff is entitled to deduct the time between his application to the conciliator and the termination of the conciliation system in the district (i. e., from 28th March to 30th May 1913).

As no certificate is granted by the conciliator, it is quite clear that S. 48, Dekkhan Agriculturists' Relief Act has no application. There is no other statutory provision corresponding to S. 48 to cover a case of this kind. The period of limitation applicable therefore would be the period prescribed under the Limitation Act, unless the plaintiff could claim to have an extension of the time in any other way.

It is clear that the plaintiff's suit would be in time if filed on 31st May 1913. The Local Government cancelled the appointments of conciliators in the district with effect from 30th May 1913. The plaintiff had made his application to the conciliator for a certificate which it was obligatory upon him to obtain at the time. Up to 30th May 1913 he could not have filed his suit without a certificate from a conciliator. All of a sudden by the Government notification he was called upon to file his suit on 31st May, which it was practically impossible for him to do. Under these circumstances we think the plaintiff is clearly entitled to the benefit of the rule that where the law creates a limitation, and the party is disabled to conform to that limitation without any default in him, and he has no remedy over, the law will ordinarily excuse him. But this rule is subject to the limitation that it will excuse him so far as it is necessary, and not beyond. The case of *Mayer v. Harding* (1)

(1) [1867] 2 Q. B. 410 = 9 B. & S. 27n=16 L. T. 429=15 W. R. 816.

and *Reg. v. Justices of Surrey* (2) are fair illustrations of the application of this principle under somewhat different circumstances. The plaintiff in this case would be entitled to such extension of time as would be necessary to secure him a reasonable opportunity to file the suit in time, which it became practically impossible for him to do in virtue of the Government notification. It is not possible to lay down any general rule as to what period would be sufficient to constitute a reasonable opportunity. It must depend upon the circumstances of each particular case, which must be duly proved. Thus, though the plaintiff in this case is not entitled to deduct the time from 28th March to 30th May 1913, he is entitled to such extension of time as may be necessary to give him a reasonable opportunity to enable him to file the suit in time.

We are indebted to Mr. G. S. Rao for having argued the case on behalf of the defendant at our request.

G.P./R.K. *Reference answered.*

(2) [1880] 6 Q. B. D. 100=50 L. J. M. C. 10=43 L. T. 500=29 W. R. 260=45 J. P. 93.

A. I. R. 1914 Bombay 202 (1)

HEATON AND SHAH, JJ.

In re Manku Bala Patil — Applicant.

Criminal Revn. Appln. No. 329 of 1914, Decided on 25th September 1914, from order of Dist. Registrar, East Khandesh.

Criminal P. C. (1898), S. 195 — District Registrar—Criminal P. C. (1898), S. 476.

A District Registrar, as provided in S. 195, is not a "Court" and has therefore no jurisdiction to make an order under S. 476 of the Code. [P 202 C 1]

P. B. Shingne—for Applicant.

S. S. Patkar—for the Crown.

Judgment.—We desire to point out to the District Registrar in this case that he has no jurisdiction to make an order under S. 476, because, as provided in S. 195, Criminal P. C., the District Registrar is not a "Court" and S. 476 is so intimately connected with S. 195 and is designed to serve a purpose so similar to that served by S. 195, that we cannot doubt that what is declared not to be a "Court" for the purpose of S. 195 is also not a Court for the purpose of S. 476. We do not how-

ever interfere with the order for this reason, that precisely the same practical result would be brought about by the presentation of a complaint of the offence to a Magistrate who has jurisdiction to inquire in it; or by the District Registrar as a Magistrate proceeding under Sub-S. (1), Cl. (c), S. 190, Criminal P. C.,

G.P./R.K.

Application rejected.

A. I. R. 1914 Bombay 202 (2)

SCOTT, C. J.,

On difference between

BEAMAN AND HAYWARD, JJ.

Basangauda Nagangauda and others—
Defendants—Appellants.

v.

Basangauda Dodangauda—Plaintiff—
Respondent.

Second Appeal No. 525 of 1913, Decided on 19th August 1914, from decision of First Class Sub-Judge, Bijapur, in Appeal No. 11 of 1912.

(a) **Hindu Law — Succession — Brother's widow is next reversioner in preference to cousin.**

Under Mitakshara School the widow of a brother would be the next reversioner in preference to the first cousin.

(b) **Hindu Law—Widow — Acceleration—Essentials stated.**

The only essentials of a good legal acceleration are that it should be to the next in reversion and that it should cover the whole life-estate. No consent of reversioners is needed, still less any proof of necessity. [P 206 C 1]

P. D. Bhide—for Appellants.

K. H. Kelkar—for Respondent.

Beaman, J.—The point of greatest importance and difficulty in this appeal is whether Timawa widow of Kardepa, or the first cousins of the deceased Dodangauda stand nearest in the reversion.

Dodangauda and Karlepa were undivided brothers. Kardepa died, leaving him surviving his widow Timawa. Then Dodangauda died and his widow Doddawa took her life-estate. She professed to give away the whole of it in 1883 to her deceased husband's first cousins, the defendants. Twenty-six years later she adopted the plaintiff. Timawa, the widow of Kardepa, is still alive.

The defendants rely on the doctrine of acceleration which may now be taken to be established law. I shall have to say a few words upon that later. Here it is sufficient to state that true accelera-

tion can only occur between the tenant of the life-estate and the nearest reversioner. Therefore, if Timawa was the nearest reversioner in 1883, there could have been no acceleration in that year in favour of the defendants, and the plaintiff would, in the absence of any other defence, be entitled to succeed.

It may be noted here, though this fact falls more properly to be considered in discussing the doctrine of acceleration that the life-estate comprised certain vatan property as well as other non-vatan immovable property. It is not disputed that under the law of vatan the defendants were the nearest reversioners to the vatan lands. So that in respect to so much of the claim, if the acceleration be otherwise good, there can be no doubt but that the plaintiff must fail. The larger portion of the life-estate, however, is not vatan land; and the decisions of both Courts below are based on the assumption that Timawa, and not the defendants, was the nearest reversioner. In my opinion, although two learned Judges below appear to have taken it for granted that she was and early in the argument here pleaders on both sides were disposed to support that view, she is not.

It is contended for the plaintiff that the decision in *Lallubhai Bapubhai v. Mankuvarbai* (1) concludes the point. That case was confirmed by the Judicial Committee, and undoubtedly settled the law it professed to lay down. The question is whether that or any other authority goes the length of holding that the widow of a brother is nearer in the reversion than first cousins. It can only be by an extension, of any actual decision, in other words by taking the supposed principle of such a case as that of *Mankuvarbai's* and extending it to the case before us, that this can be affirmed. It is therefore necessary to be sure that we are rightly apprehending the principle underlying the decision in *Mankuvarbai's* case (1) before saying that it not only can, but must, be extended to cover this case.

What was decided in *Mankuvarbai's* case (1)? This and this only. Where there is competition between reversioners after the extinction of all designated heirs, the widow of a gotraja sapinda excludes male gotraja sapindas

in a remoter line. I can accept that at once as undoubtedly the law of this Presidency, whether really good Hindu law or not, and yet hold for reasons which will be fully stated, that the case before us is not necessarily governed by that decision or by the principle upon which it is based. In a much later case decided by Telang, J., probably the greatest Hindu Judge who has sat on this Bench, it was held that where there is a competition between reversioners after the exhaustion of all designated heirs, the widow of a gotraja sapinda is postponed to any male in the same line. And that decision was followed and explained in a very recent case, *Kashibai v. Sitabai* (2), decided by the present learned Chief Justice. Almost synchronously a Bench of this Court consisting of my brother Hayward and myself decided a similar case *Khanda-charya v. Govindacharya* (3), on exactly the same principle and professedly following *Rachaha Kalingapa* (4) and *Kashibai v. Sitabai* (2).

I rely upon those three cases. I say that so far as the law permitted after the decision in *Mankuvarbai's* case (1), they correctly lay down the Hindu law applicable to such facts as those before us, and that the principle of those cases is the principle which ought always to be applied.

That principle does not in any way conflict with the actual decision in *Mankuvarbai's* case (1), though it is open to argument whether there are not dicta in the judgment of West, J., and afterwards in the judgment of Judicial Committee, which imply the extension of the reason of that case as far as the plaintiff would have it extended in the case before us.

The point really lies in a very narrow compass. I do not propose to attempt any elaborate examination of the Hindu law books, or any nice criticism of the textual commentaries with which the subject has been encumbered. But a careful critical study of West J's. judgment in *Mankuvarbai's* case (1) and of the judgment of the Judicial Committee confirming it, shows that in spite of the extraordinarily learned and exhaustive examination of the whole avail-

(2) [1911] 11 I. C. 560=35 Bom. 389.

(3) [1911] 12 I. C. 566.

(4) [1892] 16 Bom. 716.

(1) [1877-78] 2 Bom. 381.

lable Hindu law, the conclusion rested finally on what was held to be an established custom rather than any authoritative deduction from the words of the Hindu lawgivers and commentators.

The latter were found to be so nebulous, contradictory, inconsistent and unconvincing as to afford but little solid ground upon which to base a decision either way. I understand that the custom was made out from the answers of local Shastris to questions propounded to them by the authors of West and Buhler. It is possible that such answers may have truly represented established local customs; but in strictness they can hardly amount to what the law ordinarily requires as proof of custom. They are in reality no more than the dogmatic interpretation by a body of unknown persons of certain ancient writings with which they were supposed to be familiar. In dealing with this point their Lordships of the Judicial Committee say, obiter, that Shastris have gone so far as to declare that a sister-in-law excludes first cousins. As that is precisely the case before us, the plaintiff naturally relies most strongly on this passage. It is however, as I have just said, purely obiter. And it is noteworthy that in fact the Shastris consulted were not unanimous on this point. One decided that the sister-in-law did, another that she did not, exclude a first cousin. And apart from that there is as far as I know, no authority whatever, either in the accredited law books or in decided cases, for the proposition on which the plaintiff's success in this case must depend. So far from it being a proved custom in this Presidency that a sister-in-law excludes a first cousin, I am moderately confident that no such rule of succession has ever been alleged much less proved, in our Courts. The textual basis of the rule laid down in *Mankuvarbai's* case (1) appears to have been chiefly a passage in Brihaspati. The reason contained in the passage is so childish and fanciful, and would lead, if pushed to its logical conclusion, to such absurdities that it is no wonder Telang, J., declined to adopt it, saying that it looked, as indeed it does, like proving too much. The rule in *Mankuvarbai's* case (1), which must, I think, be regarded as something of a Judge-made innovation, could hardly be

made good by any mere collation of the recognized sources of Hindu law. But in applying that law it was held that a custom had grown up in the Bombay Presidency, which warranted laying down the broad rule that, as between competing reversioners, the widow of a gotraja sapinda took in preference to a male gotraja sapinda in a remoter line. Had the point needed decision at the time it is possible that West, J., would have extended the rule so as to give preference to the widow of a nearer male gotraja sapinda over a remoter male sapinda in the same line. But Telang, J., refused to do this, holding that where the competitors were in the same line, sex and not mere proximity was the determining consideration, and that any male in the same line excluded the widow of any other male, although the latter, had he been living, would have been nearer to the propositus, and so the next reversioner. It is only by taking the reasoning or parts of the reasoning in West, J.'s judgment, by saying that it in effect establishes this proposition, that the widow of a deceased gotraja sapinda fills her husband's place in all heirship competitions, that the plaintiff can hope to succeed in his contention that Timawa was a nearer reversioner than the defendants. But that is not the law. Since *Rachava's* case (4) it cannot be argued that greater propinquity in the same line makes a widow nearer in reversion than a male in the same line. So that the only real question arising on the cases is: What is meant by "the line?" In my opinion all the cases are here in agreement. There is not one in which where the question was, which of two persons claiming to be reversioners is entitled to the estate, the line was started within the group of designated heirs, or as it is often called the "compact series."

No support is to be found anywhere for such a method, except the conflicting replies of the local Shastris, unsupported by reason or text.

It appears to me to be too clear to admit of doubt that where we have to look for the next reversioner, we must start the line outside the group of designated heirs. Within that group there could, of course, never be any conflict between the widow of a designated heir and a designated heir. It is only after

the exhaustion of the designated heirs that the search for the nearest reversioner begins. The plaintiff's contention appears to be that, although the statement just made is self-evident, yet where the compact series is exhausted, the first line must be started from the father, not from the grandfather of the propositus. If that were done here, the line would begin with the father of Kardepa and Dodangauda, himself one of the designated heirs, within the compact series, and, of course, the widow of either of his sons would be in the line, while his nephews would not. It will be seen that whether by mere accident, or because the learned Judges responsible for those judgments rejected any such method, this has never once been done. The language of Telang, J., is particularly clear on the point. The line is to start in the first instance from the paternal grandfather. When that line is exhausted without yielding a reversioner, a fresh line is to be started from the paternal great-grandfather and so on.

In the case which Hayward, J., and I decided, we followed this rule, and, speaking for myself, I am sure I did so because it did not occur to me as arguable that a line laid out for the purpose of finding a reversioner could properly be started within the compact series. This too was what was done, and I cannot believe by pure accident, in all the other cases. But it might be said of them that there was no surviving widow of any male within the compact series, while in *Khandacharya's* case (3) there was. Still in that case the Court started the line not from the father of Venkatesh, the deceased propositus, but from his paternal grandfather Venkatesh I. Even so the widow of his brother came nearer in the reversion than second cousins. But had there been first cousins in the competition it is plain, upon the principle stated in the judgment, that the result would have been different and that the widow would then have been postponed. If in the present case the line be started from the paternal grandfather it is clear that Timawa is not only in the same line as the defendants but in precisely the same degree of propinquity. The latter fact is unimportant now. If she represents a deceased

male gotraja sapinda in the same line, then she comes last of that line and any male found in it excludes her. The defendants are in the line, and, in my opinion, they clearly exclude her. Nothing in the decided cases compels me to extend the rule, as I am asked to extend it here, so as to exclude the first cousins in favour of the sister-in-law. I think that doing so would be entirely opposed to the sense of the Hindus of this Presidency and the spirit of the old Hindu law. Women are probably much more favoured already in this Presidency under the liberal decisions of this High Court than elsewhere in India but I find it difficult to believe that there is really anything in the recognized Hindu scriptures or the authoritative commentaries on them to warrant the proposition for which the plaintiff is now contending. If the 'rule' really rested on the extravagant texts of Brihaspati then there would be no need to search along any line for the next reversioner, for neither of the brothers Kardepan or Dodangauda is dead, each is only half dead, and no reversion has opened.

But if there is a question of reversion to be investigated, it pre-supposes the complete exhaustion of the compact series and places the starting point of the search outside that series, invariably, as Telang, J., states, first at the paternal grandfather. Let that be done here and it will be seen at once that Timawa was not the next reversioner in 1883 while the defendants were.

The doctrine of acceleration very clearly stated in the judgment of Lord Morris, in *Behari Lal v. Ahir Gayawal* (5), would seem to have been almost invariably entangled in subsequent decisions of the Indian Courts with the altogether different doctrine of alienation. Briefly, Hindu widows in enjoyment of life-estates may not alienate any part of the immovable property, except for legal necessity. Analysis will show that this is the single recognized justification, although the language of Judges often obscures it and suggests that pious motives may be substituted for necessity and may validate even larger alienations and freer powers to alienate than could

be seriously considered on a narrow ground of mere secular necessity. Yet whether the necessity be temporal or spiritual so sought for as legal justification for these alienations, it will always be seen on close examination to be necessity and nothing else. Long ago the legal notion got abroad and soon received judicial sanction that the consent of all the nearest (in order) reversioners was good proof of the necessity for the alienation. If there had been no necessity, it was argued, the reversioners would never have consented to lose their expectant rights. Here it is to be observed that in applying this doctrine, it is not the consent of the reversioners, per se, which makes good what would otherwise be a bad alienation by a life tenant, but the presumed, though undiscovered, necessity of which that consent is good proof. If there are on the date of the alienation three reversioners in this order, *A B, C*, and the alienation be made to *B*, *A* consenting then it may be presumed that in *A*'s judgment there was a true necessity for the alienation. In a less degree too, of course, if *C* consents; for, although *C* is lost in the reversion, it is quite possible that but for the alienation to *B* he might have been the nearest reversioner at the termination of the life-estate. But no inference of this kind could reasonably be drawn from the consent of *B* to an alienation to himself.

Most men will consent to receiving a benefit, and in those cases giving this "consent" (which in this connexion hardly has any meaning) would not, in fact or at the bar of reason and common-sense, point towards the existence of any necessity. A great majority of cases falling under this doctrine are however cases of alienations to outsiders. If the consent of all reversioners be obtained to such an alienation, it is probably true in fact, as assumed by law, that that consent indicates the existence of some necessity for the alienation. I have laboured this extremely elementary proposition more than its intrinsic content would seem to need, because I have found in so many decided cases recurring confusion between the princi-

ples governing this kind of alienation and a proper case of acceleration. The only essentials of a good legal acceleration are that it should be to the next in reversion and that it should cover the whole life-estate. But the consent of the reversioner in whose favour the reversion is accelerated, or of any other more distant reversioner, is obviously immaterial. Nor does any question of necessity arise. The reason why the two conditions I have stated are essential is, and I think always ought to be, obvious. By accelerating (as the word implies) the tenant of the life-estate may be said figuratively to commit legal suicide. She brings about exactly the same legal results as would follow by operation of law upon her natural death. If at the date of the acceleration the widow with the life-estate were to die, the next reversioner in whose favour the acceleration is made would, of course, take the whole life-estate accelerated.

But no acceleration can be made in favour of anyone but the next reversioner, for that would be more than committing legal suicide, it would be making a will as well. And this the widow has no power to do, as far as the immovable property in which she has the life-estate is concerned.

It is therefore absurd to talk of accelerating in favour of, say, the reversioner third in order of proximity, with the consent of the two who stand nearer. That is not acceleration but alienation. Similarly it would be absurd to talk of accelerating four-fifths of the life-estate. For since the validity (in theory) of the acceleration depends upon the result corresponding exactly with the result which would follow the natural death of the widow accelerating, there can never be any question of deliberate reservation in her own favour. It does not however follow from this, as indicated in an earlier passage of this judgment, that the life-estate may not be composite and that there may not be different reversioners to its parts. Thus where the life-estate in immovables comprises vatan and other property, it is quite possible that the nearest reversioner to the vatan may not be the nearest reversioner to the rest of the immovable property. This I believe to be the only real excep-

tion to the general rule that a true acceleration must pass the whole life-estate. And in strictness it is not an exception. For, so far as the vatan property accelerated is concerned, the acceleration does bring about exactly the same legal result as the death of the life-tenant would have done.

Theoretically, acceleration is not an alienation at all, but a mere renunciation, the obliterating of a bar. The life-estate is withdrawn in its entirety; it is voluntarily extinguished, and it is not the tenant of the life-estate, but the law, which does the rest. It will therefore become apparent that no consent of the reversioners or anyone else can be needed to validate a true acceleration; still less any proof of necessity. The condition that the acceleration must comprise the whole life-estate is essential to its theoretical perfection. So that a widow with a life-estate in 20 fields cannot accelerate ten of them and retain ten, and this applies universally and irrespective of the proportion of what is alienated to what is reserved. But I should doubt whether niggling objections on this score, such as have been raised here and been acceded to by the Courts below, can fairly be said to arise under a commonsense and rational application of the general principles. For example, it is contended for the plaintiff that because the widow with the life-estate did not specifically accelerate the right, she had to nominate an officiating vatandar when she accelerated the vatan lands, that was a reservation which invalidates the acceleration. I think that is going too far. In the first place, I believe it was merely an unintentional omission, the right being of no value that I can see to the widow. I have not the least doubt that had she thought of it and been competent to accelerate it, she would have done so. But the real answer perhaps is that without the sanction of Government she was not competent to alienate this right. And it may, of course, have been that neither she nor the next reversioner in whose favour she accelerated cared to raise the question before the revenue authorities as long as the widow lived. In point of fact we were told during the argument that she never attempted to exercise this right for many years

after the acceleration of 1883. She has asserted it recently, but probably under legal advice for the sole purpose of taking this objection. Now, small and unintentional omissions of that sort might occur in the acceleration of every large life-estate in immovable property. I think in this country, where such transactions are often effected without professional assistance, all such *casus omissi* ought to be neglected.

What is to be looked at is the intention of the tenant of the life-estate, and that is not to be defeated, if on the whole plain, merely because she has failed to enumerate every tree or shed or right of way or other unimportant right annexed to or inherent in the property.

I am of opinion that the failure to mention this vatan right specifically in the acceleration of 1883 does not invalidate it as being a conscious and intentional reservation to the accelerating tenant of the life-estate of any part of it in her own favour.

In my opinion therefore the plaintiff fails on every point and his suit ought to be dismissed with all costs throughout. In the event however of my being wrong in holding that Timawa was not the next reversioner, I should entirely concur with the order proposed by my brother Hayward. The only point of law therefore upon which we differ is whether in 1883 Timawa or the defendants stood next in the reversion. That point must be referred under S. 98, Civil P.C.

Hayward, J.—Plaintiff sued as the adopted son to recover certain property, non-vatan and vatan, transferred twenty-six years before his adoption by his adoptive mother to the first cousins of his adoptive father.

The original Court held that the transfer was ineffectual as an acceleration or surrender by the adoptive mother of the non-vatan property, as there was in existence a widow of a brother who was the next reversioner in preference to the first cousins of the adoptive father but that the transfer was effectual as an acceleration or surrender by the adoptive mother of the vatan property, as the widow of the brother was excluded from inheritance to vatan property and the first cousins were the next reversioners under the Vatan Act.

The first appeal Court held that the transfer was not even effectual as an acceleration or surrender by the adoptive mother of the vatan property, as it did not include the right to appoint an officiating Patil and was consequently not a surrender of the whole of the vatan property under the Vatan Act.

The second appeal to this Court has resulted in the suggestion towards the close of arguments that the widow of a brother would not be the next reversioner in preference to the first cousins as assumed up to that stage of the proceedings by all parties. The suggestion has been that a special rule would govern the order of succession of widows of brothers excluding them from their place at the end of the first collateral lines of the brothers descending through the father and postponing them to the end of the second collateral lines of the first cousins descending through the grandfather, and that the general rule placing widows of collateral gotraja sapindas at the end of the collateral lines of their husbands and preferring them to males of remoter collateral lines would only come into operation in respect of the second collateral lines of the first cousins descending through the grandfather and apply to those lines and the subsequent lines descending through the great-grandfather, the great-great-grandfather and other remoter grandfathers.

The suggestion has not in my opinion, and with deference to my learned brother, been shown to be based on any solid foundation. The Mitakshara has laid down the rules of succession as follows in Chap. 2, S. 4, plac. 1 and 7 : "On failure of the father, brothers share, on failure of brothers also, their sons share " and in Chap. 2, S. 5, plac. 4: "On failure of the father's descendants, the heirs are successively the paternal grandmother, the paternal grandfather, the uncles and their sons", and in Chap. 2, S. 5, plac. 5: "On failure of the paternal grandfather's descendants, the paternal great-grandmother, the great-grandfather, his sons and their sons inherit. In this manner must be understood the succession of kindred belonging to the same general family": Setlur's Collection of Hindu law Books on Inheritance. The Mitakshara thus dealt with the first collateral lines of gotraja sapindas descending from the

father, the second collateral lines descending from the grandfather and the remoter collateral lines descending from the remoter grandfathers. The Mitakshara made no specific mention, however, of the widows of collateral gotraja sapindas, but it was decided in the case of *Lakshmibai v. Jayram Hari* (6) by Melvill, J., that the general rule was "the wives of all sapindas. . . . must be held, to have rights of inheritance co-extensive with those of their husbands, in view of the mention of the grandmother and the great-grandmothers, following the opinion expressed by West and Buhler in their work on Hindu law. This decision was developed in the subsequent case of *Lallubhai Bapubhai v. Mankuvarbai* (1). West, J., criticized a case in which a sister-in-law had been postponed to a first cousin and quoted another in which a sister-in-law had been preferred to a first cousin (p. 442), and after referring to other cases of widows of gotraja sapindas, laid down the general rule that "the widow of the gotraja sapinda of a nearer collateral line appears entitled to precedence over the male gotraja in a more remote line" (p. 449).

The Privy Council referred to the case in which the sister-in-law had been preferred even to first cousins and confirmed the general rule, as a matter of custom in the Bombay Presidency, in the appeal entitled *Lallubhai Bapubhai v. Cassibai* (7). In the case of *Kesserbai v. Valab Raoji* (8) Westropp, C. J., remarked that "the rule laid down. . . . (that the widows of gotraja sapindas stand in the same places as their husbands, if living, would respectively have occupied) was intended to be subject to the right of any person whose place is so specially fixed on that roll, as (amongst others) that of the sisters," whose place he had indicated as being next after the grandmother, that is to say, before the grandfather (pp. 197 and 209). In the case of *Nahalchand Harakchand v. Hemchand* (9) West, J., further emphasized the right of persons whose place was specially fixed to precede widows

(6) [1869] 6 B. H. C. R. 152.

(7) [1880-81] 5 Bom. 110=7 I. A. 212=7 C. L. R. 445.

(8) [1879-80] 4 Bom. 188.

(9) [1885] 9 Bom. 31.

of gotraja sapindas by saying: "the members of the "compact series" of heirs specifically enumerated take in the order in which they are enumerated. . . . preferably to those lower in the list and to the widows of any relatives, whether near or remote, though where the group of specified heirs has been exhausted, the right of the widow is recognized to take her husband's place in competition with the representative of a remoter line" (p. 34). The compact series of heirs has been referred to as the series ending with the brother's son in both the Mitakshara and Mayukha (Mitakshara, Chap. 2, S. 5, plac. 2, and Mayukha, Chap. 4, S. 8, plac. 18):—Setlur's Collection of Hindu law Books of Inheritance. The particular privileges reserved by these two cases did not, therefore, extend to members of the second collateral lines descended from the grandfather. In the case of *Rachava v. Kalingapa* (4) Telang, J., did not refer to all the rules of succession quoted above from the Mitakshara.

It was not necessary to do so as the case before him related only to succession among members of the second collateral line descending from the grandfather. He did not even quote verbatim the rules relating to succession among members of the second collateral lines descending from the grandfather or of the remoter collateral lines descending from remoter grandfathers. But he stated without qualification that "the decision in *Lallubhai Bapubhai v. Mankuvarbai* (1) having been affirmed by the Privy Council, the eligibility for inheritance of female gotraja sapindas, who have become such by marriage, is no longer open to dispute. And it also must be taken to be the result of that decision that where the contest lies between a female gotraja representing a nearer line and a male gotraja representing a remoter line of gotraja sapindas, the former inherits by preference over the latter" (pp. 718-719). Similar remarks apply to the cases of *Kashibai v. Sitabai* (2) decided by a Bench including the present Chief Justice and *Khandacharya v. Govindacharya* (3) decided by the present Bench. It appears, therefore, to me that the general rule in favour of widows of gotraja sapindas of nearer collateral lines excluding male gotrajas of

remoter lines has been laid down as a general rule having application to all collateral lines, and not merely to the second and subsequent collateral lines descending from the grandfather and remoter grandfathers, by a long series of decisions of this Court.

The result of that view, if correct, would be that the brother's widow was the next reversioner to the non-vatan property in preference to the first cousins of the adoptive father. The brother's widow has been found not to have given her consent to the transfer of the non-vatan property. That finding proceeded on the view that there was no evidence of such consent, overlooking the 26 years' acquiescence which might well have been regarded as good evidence of implied consent. If it had been a case of alienation to third parties, it might have been necessary to consider whether that finding could not be challenged as consequently wrong in law and whether, in any case, the consent was necessary of the female next reversioner in addition to the consent of the subsequent male reversioners in view of the remarks in the case of *Vinayak v. Govind* (10) and *Bajrangi Singh v. Manokarnika Bakhsh Singh* (11). But it was not a case of alienation to third parties. It was a gift to the subsequent reversioners and the doctrine of consent indicating legal propriety or necessity could not be extended to gifts to reversioners, as pointed out in the case of *Pilu Appa v. Babaji* (12). The transfer, moreover, could not be held effectual as an acceleration or surrender, because it did not pass the estate to the next but to the subsequent reversioners. It could only have been held effectual as a joint acceleration or surrender of the estates both of the holder and the next reversioner to the subsequent reversioners. But something more than mere implied consent of the next reversioner would have been necessary to constitute that reversioner a party to the acceleration or surrender in favour of the subsequent reversioners.

The result of my view, even if correct, would not however affect the validity

(10) [1901] 25 Bom. 129=2 Bom. L. R. 820.

(11) [1908] 30 All. 1=35 I.A.1=5 A. L. J. 1=9 Bom. L. R. 1848=3 C.L.J. 766=17 M.L.J. 605=12 C.W.N. 74=3 M.L.T. 1 (P.C.).

(12) [1909] 4 I. C. 584=34 Bom. 165.

of the transfer of the vatan property. The brother's widow would, in any case be excluded from the inheritance by the special provisions of the Vatan Act, and the transfer would *prima facie* be valid as an acceleration or surrender in favour of the next reversioners and not merely of subsequent reversioners. It has, however, been contended that it was invalid, as it related merely to the vatan property and as it did not include the right to appoint an officiating Patil under the Vatan Act and as it was not, therefore, an acceleration or surrender of the whole estate vested in the vatandar. But it does not appear to me to be contrary to the general principle that the whole estate must be surrendered, as laid down by the Privy Council in the case of *Behari Lal v. Madho Lal Ahir Gayawal* (5), to regard the vatan property with its special rules of succession as a separate estate vested in the vatandar and to hold that the rule has no application to property like the right to appoint an officiating Patil which, at most, would be property inalienable under the Vatan Act without the special sanction of Government.

The first appeal Court's decision decreeing the claim would therefore, in my view of the case, have to be confirmed as regards the non-vatan property, but reversed and the claim dismissed as regards the vatan property, and the parties ordered to bear their own costs throughout, including the costs in this Court.

(On difference the case was put before)

Scott, C. J.—In my opinion Timava, the widow of Kardepa Dodangauda's brother, is a nearer heir of Dodangauda than his uncle's sons, the defendants.

I entirely agree with the reasoning and conclusion of Hayward, J., upon the point. The compact series of heirs ends with the brother's son (Mitakshara Chap. 2, S. 5, pl. 2; Mayukha, S. 8, pl. 18).

The grandmother's place is specially fixed and this alone gives her preference over unspecified sapindas in the line of the father. I can find no reason for treating the brother's widow as a sapinda to be postponed to all males capable of inheriting in the line of the grandfather. On the contrary, the position that brother's wives are sapindas in the line of the father for

all purposes, results clearly from the following passage in the Acharakanda of Vijnaneshwara which was discussed in *Lallubhai Bapubhai v. Mankuvarbai* (1), and very recently by the Judicial Committee in *Ramchandra Martand Waiker v. Vinayak Venkatesh* (13): "In like manner brothers' wives also are (sapinda relations to each other), because they produce one body (the son), with those (severally) who have sprung up from one body (i. e., because they bring forth sons by their union with the offspring of one person and thus their husband's father is the common bond which connects them)." Hayward, J., has referred to *Kesserbai v. Valab Raoji* (8) and *Nakalchand Harakchand v. Hemchand* (9). I will only add in support of his conclusion reference to *Russoobai v. Zooekhabai* (14) and *Trikam Purshotam v. Natha Daji* (15). In the first of these cases the judgment was delivered by Sir Charles Sargent, one of the Judges who decided *Ramchandra v. Krishnaji* (16) referred to in *Rachava v. Kalingappa* (4). He said of a stepmother: "It is a necessary inference from *Lallubhai Bapubhai v. Mankuvarbai* (1) that she is entitled to inherit as a gotraja sapinda. The latter case, as explained by the judgment in *Rachava v. Kalingappa* (4) must be taken as deciding that the widows of gotraja sapindas in the case of collaterals are to be preferred to the male gotrajas in a more remote line, and a fortiori the widow of a male gotraja in the ascending line... will have that preference over such collateral." The uncle's sons are indeed mentioned in pl. 4, Chap. 2, S. 5, of the Mitakshara, but they cannot be regarded as specially mentioned in the succession so as to preclude the operation of the above rule. In *Trikam Purshotam v. Natha Daji* (15) Chandavarkar, J., said: "If once it is conceded that a half-sister is a gotraja sapinda, he stands nearer to the propositus in the line of heirs than a paternal uncle."

G.P./R.K.

Order accordingly.

(13) A. I. R. 1914 P. C. 1 = 25 I. C. 290 = 42 Cal. 384.

(14) [1895] 19 Bom. 707.

(15) [1911] 12 I. C. 359 = 36 Bom. 120.

(16) S. A. No. 624 of 1888 (Unreported).

A. I. R. 1914 Bombay 211 (1)

HEATON AND SHAH, JJ.

Bai Ujam—Plaintiff—Appellant.

v.

Bai Rukhmani—Defendant—Respondent.

Second Appeal No. 859 of 1912, Decided on 20th August 1913, from decision of Acting Dist. Judge, Broach, in Appeal No. 44 of 1912.

Limitation Act (1908), S. 15 (1)—Order directing execution respecting costs only—Stay of execution obtained on appeal—Decree-holder held entitled to exclude period of stay of execution in computing period for another execution application.

Where an appeal from an order directing execution to proceed in respect of costs only, an order staying the execution was obtained.

Held: that the decree-holder was entitled under S. 15, sub-S. (1) to exclude the period during which the execution had been stayed and in computing the period for another application for execution, the fact that the execution order related only to a part of the decree was immaterial. [P 211 C 2]

G. N. Thakor—for Appellant.

G. S. Mulgaokar—for Respondent.

Judgment.—This is an appeal by the decree-holder, who obtained a decree against the present respondent, and made an application for executing it on 6th August 1908. That application was made against the defendant and the surety. The present application was made on 12th August 1911. The judgment-debtor objected to the application on the ground of limitation. In both the lower Courts, this plea has succeeded, and the *darkhast* has been dismissed as being time barred.

In the second appeal before us, it has been contended by the appellant that the application is in time on various grounds. It is not necessary to deal with all the grounds urged in support of the appeal, as it is possible to decide the appeal on one ground only. It is an admitted fact in the case that the present defendant and the surety appealed against the order made by the Court of first instance on 30th November 1908, directing execution to proceed as to a part of the decree, and in that appeal they obtained an order for staying the execution of the decree which remained in force from 9th January to 18th February 1909. It is contended on behalf of the appellant that under S. 15, Lim. Act, this period ought to be deducted from the period of limitation, and that, if that period

is deducted, the present application is in time. We think that this contention ought to be allowed. Under S. 15, sub-S. (1), Lim. Act, the appellant is clearly entitled to have this time excluded in computing the period of limitation in this case. The lower appellate Court, while dealing with this point, thought that as the order of the 30th November 1908 related only to the recovery of costs, that deduction of time ought not to be made. We think that it is perfectly immaterial for the purposes of the present point as to whether the order of 30th November 1908 related only to a part of the decree. If the period during which the execution of the decree had been stayed is excluded, the present application is clearly within time.

We hold, therefore, that the application is in time. The order of the lower appellate Court is reversed and the case remanded for disposal according to law.

All costs to be costs in the application.
G.P./R.K. *Case remanded.*

A. I. R. 1914 Bombay 211 (2)

SCOTT, C. J. AND CHANDAVARKAR, J.

Nusserwanji Pestonji Wadia—Appellant.

v.

Eleonora Wadia—Respondent.

Appeal No. 77 of 1913, Decided on 31st March 1913.

(a) Jurisdiction — Bombay High Court—Restitution of conjugal rights—Respondent Parsi or not within Presidency — High Court cannot hear suit.

The Bombay High Court has no jurisdiction to grant a decree for restitution either against a Parsi respondent or a respondent not within the Presidency. [P 213 C 1]

(b) Jurisdiction—Matrimonial jurisdiction is not based on domicile.

The matrimonial jurisdiction of the Indian Courts is in no way based upon domicile. [P 213 C 2]

(c) Divorce Act (1869), S. 2—Residence must be bona fide and not casual.

The residence of the petitioner within the meaning of S. 2 must be bona fide and not casual or as a traveller. [P 214 C 1]

(d) Divorce Act (1869), S. 2—Petitioner wife is entitled to have fund paid by husband for attorney's benefit whatever may be result of petition.

The petitioner wife under the Act is entitled to have the fund paid in by the husband for the benefit of the attorney, so applied whatever the result of the petition, provided of course that the attorney is in no way to blame. [P 215 C 1]

Strangman, Inverarity and Setalvad—for Appellant.

Kemp and Weldon—for Respondent.

Scott, C. J.—The first question that arises is whether the Court has jurisdiction to entertain this suit which is for restitution of conjugal rights.

The petitioner is an English woman professing the Christian religion.

The respondent is a Parsi whose parents reside in Bombay.

The parties were married in London on 4th August 1911.

On 11th October in that year, they started for India and arrived in Bombay about the end of that month.

On 3rd February 1912, they left Bombay again for London travelling via Marseilles. They arrived at Victoria Station, London on 19th February 1912, where the respondent left the petitioner. He has since refused to live with her though offering her a certain maintenance. It is alleged on affidavit that subsequent to February 1911 he has obtained employment as a commercial traveller on £200 per annum in England.

On 8th March 1912, the petitioner announced her intention of going to India to bring her case before an English Judge "as soon as the necessary arrangements for her going and remaining there for the necessary time, etc.," were completed.

She started for Bombay to carry out her resolution on 19th April, and arrived on 10th May 1912. She filed her petition for restitution in this Court on 27th June.

The learned Judge finds as a fact, and it is not disputed, that she came to Bombay in order to file her petition. He was of opinion that this Court had jurisdiction to try the suit, under S. 2, Divorce Act, if it found that the petitioner professed the Christian religion and resided in Bombay at the time of presenting the petition; and being of opinion that she had no permanent residence anywhere else decided the issue of jurisdiction in her favour.

The provisions of S. 2 of the Act relating to or affecting jurisdiction are of a negative and exclusive character except Cl. 1 which relates to its local extent: Cl. 2 prevents the Court from granting any relief except where the petitioner professes the Christian reli-

gion and resides in India at the time of presenting the petition.

Clause 3 prevents the Court from dissolving marriages except in the case of Indian marriages — or where certain specified matrimonial offences have been committed in India or where the husband has abjured the Christian for some other form of religion.

Clause 4 prevents the Court from making decrees of nullity except in the case of Indian marriages.

Section 4 confers upon the High Court and District Courts, subject to the provision of the Act, "the jurisdiction then exercised by the High Courts in respect of divorce a mensa et toro and in all other causes, suits and matters matrimonial."

By S. 9, High Courts Act, such matrimonial jurisdiction was conferred on the High Courts as Her Majesty might by Letters Patent grant and direct, and it was provided that, save as by such Letters Patent might be otherwise directed, and without prejudice to the legislative powers of the Governor-General, the High Court in each Presidency should have and exercise all jurisdiction and every power and authority whatsoever in any manner vested in any of the Supreme Courts.

The ecclesiastical jurisdiction of the Supreme Courts was limited to persons described and distinguished by the appellation of British subjects, residing in the Town and Island of Bombay and the factories subordinate thereto and all the territories dependent upon the Government of Bombay. It was held in *Ardaseer Cursetjee v. Perozeboye* (1) that this jurisdiction could not be exercised over Parsis.

By Cl. 35, Amended Letters Patent of the High Court, that decision was given effect to by limiting the jurisdiction within the Presidency to "matters matrimonial between our subjects professing the Christian religion."

In Cl. 33 of his despatch of 14th May 1862, which accompanied the original Letters Patent, the Secretary of State wrote: "Her Majesty's Government are desirous of placing the Christian subjects of the Crown within the Presidency in the same position under the High Court as to matters matrimonial

(1) [1855-57] 6 M. I. A. 348=4 W. R. P. O. 91
=19 E. R. 130.

in general as they now are under the Supreme Court and this they believe to be effected by Cl. 35 of the Charter. But they consider it expedient that the High Court should possess in addition the power of decreeing divorce, which the Supreme Court does not possess; in other words that the High Court should have the same jurisdiction as the Court for Divorce and Matrimonial Causes in England established in virtue of 20 & 21 Vic. C. 85

" . . . I request that you will immediately take the subject into your consideration and introduce into your Council a Bill for conferring upon the High Court the jurisdiction and power of the Divorce Court in England."

The Indian Divorce Act of 1869 was apparently enacted as a consequence of this request. That Act by S. 10-17 conferred on the Indian Courts jurisdiction to grant decrees for divorce that is dissolution subject, however to the limitations stated in S. 2. It would not apparently be necessary that both parties to a divorce petition should profess the Christian religion. Nor is this a necessity in the case of petitions for nullity provided for by Ss. 18 to 21. But as regards the jurisdiction conferred to the High Court by S. 4 (which includes suits for restitution), the powers of the Courts are still limited to Christian subjects within the Presidency.

For this reason I am of opinion that the Court has no jurisdiction to grant decree for restitution either against a Parsi respondent or a respondent not within the Presidency.

The same result may be arrived at by another train of reasoning. S. 7 enacts that subject to the provisions contained in the Act, the High Courts and District Courts shall in all suits and proceedings hereunder act and give relief on principles and rules which in the opinion of the said Courts are as nearly as may be conformable to the principles and rules on which the Court for Divorce and Matrimonial Causes in England for the time being acts and gives relief.

It is established by the following cases that the Court will not give relief by way of restitution if the respondent named in the petition was absent from the jurisdiction at the time

the suit was instituted and remains absent although residence at date of suit of both spouses whatever the domicile is sufficient to give jurisdiction in suits of this nature: see *Firebrace v. Firebrace* (2); *Chichester v. Chichessor* (3) and *Armstrong v. Armstrong* (4).

In *Firebrace v. Firebrace* (2) the respondent who was absent from England at the date of the suit was an Australian. Sir James Hannen said (p. 68): "In a suit for restitution of conjugal rights the primary object is to control the husband. She asks that her husband shall in the future be compelled by the process of the Court to take her back to live with him in a common home. In other words she prays that the English law shall be put in force against him but as the obligation of a foreigner to obey the laws of this country lasts no longer than the time during which he is within its jurisdiction the tribunals of this country cannot call upon him to obey those laws after the obligation has ceased. The difficulty amounting in most cases to an impossibility of enforcing the decree of the Court in the circumstances of the present case lends additional force to the arguments against the existence of the jurisdiction." These remarks appear to me to be applicable to the present case although Bombay may be the respondent's domicile of origin: for the matrimonial jurisdiction of the Indian Courts is in no way based upon domicile.

Another aspect of the question of jurisdiction may be based upon an argument suggested by the case of *Thornton v. Thornton* (5) in which counsel suggested that the jurisdiction of the Bombay High Court in a suit for divorce was based on S. 45, Divorce Act, which imported S. 17, Civil P. C. and thus gave jurisdiction where the cause of action arose. Cotton, L. J., seems to have accepted this as the basis of the jurisdiction claimed.

The jurisdiction was really, I think based on the alleged residence of the

(2) [1878] 4 P. D. 63=47 L. J. P. 41=39 L. T. 94=26 W. R. 617.

(3) [1885] 10 P. D. 186=34 W. R. 65.

(4) [1898] P. 178=67 L. J. P. D. A. 90=78 L. T. 689=14 T. L. R. 480.

(5) [1886] 11 P. D. 176=55 L. J. P. 40=54 L. T. 774=34 W. R. 509.

petitioner in India coupled with commission of the act of adultery whilst the parties last resided together in India : see *Thornton v. Edith S. Thornton* (6); and this would be by virtue of S. 10, Divorce Act, read with S. 2. The argument however suggests that in the case of other matrimonial offences, the application of the Civil Procedure Code will involve the necessity either of residence on the part of the defendant or the accrual of the cause of action within the jurisdiction in order to enable the Court to entertain the suit.

I may add that I am by no means satisfied that the petitioner was residing in India within the meaning of S. 2 at the time of the petition. In *Manning v. Manning* (7) it was held that mere residence in England at the time of the institution of a suit for judicial separation is not sufficient to found the jurisdiction of the Court. The residence of the petitioner must be bona fide and not casual or as a traveller.

I think the Court has no jurisdiction and the petition must be dismissed.

Chandavarkar, J.—I concur.

(Subsequently, the petitioner's attorney applied that the prothonotary may be directed to retain in Court the moneys paid by the respondent as security for petitioner's costs pending taxation of his costs and to pay him his taxed costs out of the money. The Chief Justice thereupon delivered the following judgment.)

Scott, C.J.—The proceedings in which this application is made were initiated by a petition for restitution of conjugal rights by Mrs. Wadia, a Christian, against Mr. Wadia, a Parsi.

Mr. Crawford of the firm of Crawford Brown & Co. was appointed attorney for Mrs. Wadia, and upon his application an order was made by the Chamber Judge, on 19th October 1912, for the deposit by the respondents of Rs. 600 as security for the petitioner's costs. That sum was deposited on 11th November 1912. According to the terms of the order, it was to cover the petitioner's costs already incurred and to be incurred. The order was made under the settled practice of this Court to follow, in matters relating to costs under the

Divorce Act, the practice of the Divorce Courts in England.

The petitioner obtained an order for restitution from Macleod, J. An appeal was preferred against his decision upon which the appellant, in accordance with the rule of the Court, deposited Rs. 500 as security for the respondent's costs. The appeal was successful in that the Court held that it had no jurisdiction to award the relief prayed for to the petitioner, and it declined to make any order for the payment of the respondent's costs by the petitioner having regard to the ground of the decision in the appeal.

Mr. Crawford, the petitioner's attorney, now applies that the Prothonotary be directed to retain the moneys in Court pending taxation of his costs and to pay to him the costs when so ascertained out of the moneys so deposited on the ground that those sums must be applied in the first instance in satisfaction of his taxed costs as it is the established rule of the Divorce Court not to deprive the wife's solicitor of his costs out of the fund intended for his payment unless he has himself done something to justify so strong a measure : see *Flower v. Flower* (8) and *Robertson v. Robertson* (9).

On behalf of the respondent it is contended that the solicitor has no locus standi in the matter. That position appears to me not to be tenable having regard to the more recent decisions of the Divorce Court in England and Ireland showing that applications by solicitors with reference to their costs have repeatedly been entertained : see *Joseph v. Joseph & Burnhill* (10), *Nairne v. Nairne* (11), *Ballance v. Ballance* (12) and *Jinks v. Jinks* (13).

The next question is whether the attorney is right in contending that the money deposited must be treated, whatever the result of the petition, as a fund for his security. In *Hall v. Hall* (14). Lindley, L. J., said :

(8) [1873] 3 P. 132=42 L. J. Mat. 45=29 L.T. 253=21 W. R. 776.

(9) [1881] 6 P.D. 119=45 L. T. 237=29 W.R. 880.

(10) [1897] 70 L. T. 236.

(11) [1901] 85 L. T. 649=55 J. P. 777=18 T. L. R. 16=71 L. J. P. 37.

(12) [1899] 2 I. R. 128.

(13) [1911] P. 120=80 L. J. P. 84=104 L. T. 655=55 S. J. 366=27 T. L. R. 326.

(14) [1891] P. 302=60 L.J.P. 73=65 L.T. 20

(6) [1886] 10 Bom. 422.

(7) [1871] 2 P. 228=40 L. J. Mat. 18=24 L.T. 196=19 W. R. 479.

"The £45 ordered to be paid into Court in this case saw intended to enable Mrs. Hall to obtain legal assistance in the divorce proceedings instituted against her, and her solicitor naturally looked to this fund for his remuneration in conducting her defence. In the ordinary course of events he would have had his costs taxed and paid before the motion for a new trial came on for hearing, but the husband who paid the money into Court has caused the payment out to be delayed, and the money is still in Court. The motion for a new trial was dismissed with costs, and the husband has applied for payment of his costs of the appeal out of this £45. The money being still in Court, the High Court, and, on appeal, this Court, clearly has jurisdiction over the fund; but considering the purpose for which it was paid into Court, and the established rule that the Court will not deprive the wife's solicitor of his costs out of the fund intended for his payment, unless he has himself done something to justify so strong a measure, we do not think it right upon the present occasion to accede to the application of the husband."

In *Hurley v. Hurley* (15), Collins, J., made the following observations with regard to the practice in the Divorce Court:

"The rule is that, whether the wife is successful or not, the husband is bound to furnish her with the means of carrying on the litigation, and the practice has been for the Registrar to estimate a reasonable amount for her costs, which is either paid in or security is given for it. If he has made an accurate estimate, so much the better for the wife; but if his estimate is found insufficient when the trial comes on, the practice is to enlarge the amount paid in by the husband, so, that the wife may continue to be in funds, and to that she is entitled although the result may be that she is divorced. The practice therefore seems to me to be that the husband is bound to furnish the estimated amount for the wife's costs entirely independent of the result. There has been an exception engrafted on that rule that, if the result of the litigation turns out to be unsuccessful for the wife—if she is found guilty—the Court refuses to enlarge the amount which has been deposited.

(15) [1891] P. 867=61 L.J.P. 14=65 L.T. 354.

Where that practice comes from I do not know, but it only comes into consideration when the wife has been found guilty, which is not the fact here."

Upon these authorities, I think the attorney of the petitioner is justified in his contention that the fund paid in is for the benefit of her attorney and she is entitled to have it so applied whatever the result of the petition, provided, of course, that the attorney is in no way to blame. The case of *Walker v. Walker and Lawson* (16) shows that the solicitor or attorney who takes up a hopeless case must not assume that his costs will be provided for. But having regard to the fact that the petitioner secured an order on her petition in the lower Court, and that the point of jurisdiction, upon which the petition was decided in appeal, does not appear to have occurred to the counsel on either side, I cannot say that in this case the attorney was to blame for taking up the case.

Then, it is contended that, if the attorney is entitled to have the first sum deposited applied in payment of his taxed costs, he has not the same right in relation to the second sum of Rs. 500 as that would have been deposited in the case of any appeal. I think however that it may be safely assumed that if there had been no rule providing for a deposit of Rs. 500 by the appellant the attorney would have made a further application for the deposit and that application would have been granted by the lower Court or the Chamber Judge.

My order is that the sums of Rs. 600 and Rs. 500 be retained in Court and be paid out, so far as may be necessary, in satisfaction of the taxed costs of the petitioner's attorney, and that the balance, if any, after these costs shall have been satisfied, be paid out on the application of the respondent's attorneys.

I make no order as to costs of this notice, because I think that the attorney should have been more prompt in getting his costs taxed and in applying that the fund in Court should be paid out in satisfaction of those costs.

G.P./R.K.

Order accordingly.

(16) [1897] 76 L. T. 234.

A. I. R. 1914 Bombay 216

HEATON AND SHAH, JJ.

Ismail Alibhai—Accused.

v.

Emperor—Opposite Party.

Criminal Appeal No. 354 of 1914, Decided on 14th September 1914, from order of Ch. Presy. Magistrate, Bombay.

(a) Penal Code (1860), S. 75—Proof of previous conviction when admissible stated—Evidence Act (1872), Ss. 54 and 165.

The proof of a previous conviction, not contemplated by S. 75, may be adduced, provided the previous conviction is relevant under the Evidence Act. [P 217 C 1]

(b) Penal Code (1860), S. 75—When previous conviction is relevant regarding question whether Criminal P. C., S. 562, applies and also on question of punishment, Court can consider it after accused is found guilty.

Where the previous conviction of an accused is relevant with reference to the question whether the provisions of S. 562, Criminal P. C., would apply to his case and where it is also relevant on the question of punishment a Court is justified in taking it into consideration in deciding the question of punishment after the accused is found guilty. [P 227 C 1, 2]

Velinkar and *B. T. Desai* — for Accused.

S. S. Petkar and *E. F. Nicholson* — for the Crown.

Heaton, J.—This is an appeal against a conviction for using criminal force to deter a public servant from the discharge of his duties. The offence consists in this, that the two accused succeeded in preventing the arrest of a person who was believed to be taking part in traffic in cocaine. The two accused were sentenced and we are dealing with the appeal of one of them.

On the evidence I think the Magistrate was right in holding that the offence was committed. The chief question argued is this: Is a previous conviction one of the matters which a Court is permitted to consider in imposing sentence? The imposing of sentence is, within the wide limits allowed by the law, a matter of discretion; it is not a matter of proof. That is, it is a matter within the sphere, not of evidence, but of penology. S. 54, Evidence Act, is a part of the law of evidence, not a part of the penal law. It regulates what is relevant for the purpose of proof at the inquiry or trial not what is relevant for the purpose of deciding whether a long or a short sentence should be imposed. Its purpose is quite plain; ordinarily evidence of bad character, including a previous conviction,

is irrelevant to help to establish an accused person's guilt. But the law of evidence does not define or profess to define those matters which a Court should consider in using its discretion in passing sentence. What these matters are to be is largely left to practice and to the common-sense and knowledge of the world of the Court. Where they are definitely indicated, this is done in the Indian Penal Code and the Law of Criminal Procedure, the Whipping Act and so forth; most emphatically not in the Law of Evidence. One might as reasonably, I think, look to the maximum sentence to be imposed. In my judgment, therefore to apply S. 54, Evidence Act, to the matter now before us, is as much out of place as to apply, say, the Hindu law to an European's will. Of course, the previous conviction, if it is to be taken into account, must be proved to the satisfaction of the Court, and in the matter of proving it, it may be that the provisions of the Evidence Act apply. I do not wish to express any opinion on that point.

Having regard to the previous conviction I think that the sentence imposed in this case is appropriate to the offence and I would dismiss the appeal and confirm the conviction and sentence.

Shah, J.—I agree that the conviction and sentence must be confirmed in this case. The conviction is undoubtedly right. We took time to consider the question of sentence. It is argued by Mr. Velinkar that the sentence must be based upon materials which are relevant under the Evidence Act and that previous conviction which is taken into consideration by the lower Court is irrelevant under S. 54 of that Act.

The previous conviction is used in this case, not for the purpose of affecting the punishment to which the accused is legally liable, but merely to influence the Court in determining the amount of punishment which it should award. The conviction in this case is under S. 353, I. P. C. and the previous conviction in question was for assaulting an Abkari sepoy on 5th August 1905, apparently under S. 353, I. P. C. I think that under S. 165, Evidence Act, the judgment must be based upon facts declared by the Act to be relevant and duly proved. Under the Criminal Procedure Code the judgment or the particulars to be recor-

ded by a Presidency Magistrate would include the punishment to which the accused is sentenced. It is clear that the sentence must be based upon facts which are relevant under the Evidence Act. I am, however, unable to accept Mr. Velinkar's argument that under S. 54 a previous conviction is irrelevant, just as the fact that the accused person has a bad character is irrelevant. His contention in effect is that the expressions "bad character" and "previous conviction" are mutually convertible terms within the meaning of S. 54. If the section, as it is now and as it was before the Amending Act 3 of 1891, be carefully read, it seems to me clear that these expressions cannot be treated as having exactly the same meaning and scope. Though the fact of bad character is irrelevant except as provided in the section itself, it does not follow that a previous conviction is similarly irrelevant.

The case of *Emperor v. Duming* (1), which is relied upon by Mr. Velinkar in support of his contention is really not in point. There the evidence of a previous conviction was admitted before the conviction of the accused of the offence charged; and the observations in the judgment have relation to that fact. The question raised in this appeal viz. whether after conviction the proof of a previous conviction not covered by S. 75, I. P. C. can be given, did not arise and could not have been considered in that case.

I have also considered the provisions of S. 348, Criminal P. C. in connexion with this point. In my opinion the section does not touch the point that has been argued in this appeal.

It follows that the proof of a previous conviction not contemplated by S. 75, I. P. C., may be adduced provided the previous conviction is relevant under the Evidence Act. The whole question therefore is whether the previous conviction in question is relevant under the Act. It is certainly relevant with reference to the question whether the provisions of S. 562, Criminal P. C., would apply to this case, and it seems to me to be otherwise relevant on the question of punishment. The lower Court was justified in taking it into consideration in deciding the question of punishment after the accused was

(1) [1903] 5 Bom. L. R. 1034.

found guilty. I do not say that any previous conviction not covered by S. 75, I. P. C., is relevant to the question of sentence. But the question of relevancy of a previous conviction not falling under S. 55, I. P. C., must be considered and decided in each case as it arises with reference to the circumstances of that case.

G.P./R.K.

Appeal dismissed.

A. I. R. 1914 Bombay 217

HEATON AND SHAH, JJ.

Emperor—Prosecutor.

v.

Vinayak Narayan—Accused.

Criminal Ref. No. 31 of 1914, Decided on 23rd July 1914, made by the Addl. Sess. Judge, Thana.

(a) Criminal P. C., (1898) S. 349—Jurisdiction under S. 349 is conferred only on District and Sub-Divisional Magistrate.

Jurisdiction to deal with the proceedings under S. 349 is conferred upon District Magistrates and Sub-Divisional Magistrates and upon no other Magistrates. [P 218 C 1]

(b) Criminal P. C. (1898), Ss. 528 and 349—Proceedings submitted under S. 349 to Sub-Divisional Magistrate—S. 528 is inapplicable.

Section 528 of the Code has no application to proceedings submitted to a Sub-Divisional Magistrate by a Second Class Magistrate under S. 349. [P 218 C 1]

Manubhai Nanabhai—for Accused.

S. S. Patkar—for the Crown.

Shah, J.—The facts that have given rise to this reference are briefly these: The accused was in the first instance tried by a Second Class Magistrate for offences punishable under S. 336 and 452, I. P. C. He sent up the proceedings under S. 349, Criminal P. C., to the Subdivisional Magistrate, Kolaba, Northern Division, as he thought that he could not pass a sentence sufficiently severe against the accused. The Sub-Divisional Magistrate, instead of disposing of the matter himself, transferred the case to a First Class Magistrate, and the First Class Magistrate committed the accused to the Court of Sessions. The Additional Sessions Judge of Thana has made this reference pointing out that in his opinion the commitment by the First Class Magistrate is illegal.

Having regard to the special character of the provisions of Ss. 349 I am of opinion that it is only the District Magistrate or the Sub-Divisional Magis-

trate who has jurisdiction to exercise the powers mentioned in para. 2, S. 349, i. e., to pass such judgment, sentence or order in the case as he thinks fit. The Sub-Divisional Magistrate in this case has apparently acted under S. 528 which in my opinion, has no application to proceedings submitted to him by a Second Class Magistrate under S. 349; and in the argument before us it is not suggested that the powers of transfer under S. 528 could justify the transfer of the proceedings to the First Class Magistrate in this case.

Having regard to the powers of a First Class Magistrate and of a Sub-Divisional Magistrate as specified in Sch. 3 and to S. 530, Cl. (b), of the Code, I feel fortified in the view I take of the section that the jurisdiction to deal with the proceedings under S. 349 is conferred upon District Magistrates and Sub-Divisional Magistrates and upon no other Magistrates. Even assuming that the Sub-Divisional Magistrate had the power to transfer these proceedings to the First Class Magistrate, he could not transfer the jurisdiction which was conferred upon him by the section, and not upon the First Class Magistrate. It seems to me that this is not a question of the power of the Sub-Divisional Magistrate to transfer any proceedings before him, but a question of jurisdiction.

The Government Pleader has sought to support the order of commitment by relying upon S. 532, Criminal P. C. But it is quite clear that the section has no application to the facts of this case, in which the proceedings are supposed to be wholly without jurisdiction. I think therefore that the proceedings before the First Class Magistrate are without jurisdiction. The result is that the order of commitment is set aside and the proceedings are sent back to the Sub-Divisional Magistrate, to whom they were, in the first instance, submitted by the Second Class Magistrate under S. 349, to be disposed of by him according to law. We are indebted to Mr. Manubhai for having argued the reference on behalf of the accused at our request.

Heaton, J.—I concur. I do not feel any doubt now (at one time I did) that S. 349 confers special powers, or,

what may be called, a special jurisdiction, and confers it only on District and Sub-Divisional Magistrates. That being so, every case, which is referred under S. 349 must be disposed of by a Magistrate who has that special jurisdiction. In this particular case the matter was disposed of by a Magistrate who had not this jurisdiction and I concur in the proposed order.

G.P./R.K.

Order set aside.

A. I. R. 1914 Bombay 218

SCOTT, C. J., AND BATCHELOR, J.

Sorabji Hormusji Batliwala—Defendant—Appellant.

v.

Jamshedji Merwanji Wadia—Plaintiff—Respondent.

Original Civil Appeal No. 6 of 1913. Decided on 26th August 1913, from judgment of Macleod, J.

Tort — Negligence — Damages — Suit for damages for personal injuries — Plaintiff bare licensee being gratuitously driven by defendant in motor car — Disaster through want of caution — Motor driver's duty is to act to best of skill reasonably expected of him — Defendant held liable for injuries caused by driving with gross and culpable negligence.

Plaintiff sued to obtain damages for personal injuries sustained while he, as a bare licensee was being driven gratuitously by his friend, the defendant, in the defendant's motor car. The sole cause of the disaster was that the defendant, in order to get a head of an incoming train, drove to the crossing and went over it at an excessive speed and in total disregard of the need of caution imposed by the fact that the road in front of him was hidden from his view on account of the abrupt turning.

Held: that the defendant was liable in damages; (2) that the driving of a motor car being a business or occupation requiring skill, and the defendant having that skill, and being a volunteer, was bound to act to the best of his skill which must be such as a person skilled in such matters may reasonably be expected to possess; 12 L. J. Ex. 264, Ref.; (3) that under the circumstances of the case, putting the skill and caution exigible from the defendant at their very lowest the defendant was grossly and culpably negligent.

[P 222 C 2]

Setalvad Davar and Mody—for Appellant.

Strangman, Wadia and Bahadurji—for Respondent.

Judgment—The suit which gives rise to this appeal was fixed to obtain damages for personal injuries sustained while the plaintiff, as a bare licensee, was being driven gratuitously by his

friend, the defendant, in the defendant's motor car.

The learned trial Judge, Macleod, J., has found that the defendant is liable on the ground of negligence, and has awarded to the plaintiff the sum of Rs. 38,000 as damages. The defendant now appeals from that decree.

It will be convenient to use the word "accident" in reference to the occurrence, but the word must be understood in its popular sense, and not as indicating any suggestion as to whether the occurrence was, or was not avoidable. The accident then occurred while the defendant was driving a party of relatives and friends in his white steam car from Deolali to Igatpuri. On the way there is a level crossing over the G. I. P. Railway and this crossing admittedly is such as needs some degree of care to pass in safety. Coming from Deolali, it is approached on a fairly straight road, but the crossing itself turns to the left somewhat abruptly from the road, and when once the crossing is passed, the road swings round sharply to the right: see the plan, Ex. B. Moreover, as the plan and the photographs on the record show, this sharp turn of the road to the right is invisible to an approaching driver until he is practically over the level crossing; and his view to his front is further impeded by a railway gateman's lodge situated on the far side of the crossing to the approaching driver's right hand. Admittedly, the defendant's car, for one reason or another, failed to take the sharp right-handed turn after the crossing: instead of doing so, it preserved its direction in practically a straight line, with the result that just beyond the crossing it left the road and ran, or jumped, down the bank to the left into the paddy field beyond. Except the defendant himself, who was at the wheel and thus had some support, all the occupants of the car were thrown out with much violence, and were more or less seriously injured; one little girl was unfortunately killed outright, and the plaintiff received such grave injuries to his leg that he will, as the medical evidence proves, remain a cripple for the rest of his life.

The first question which arises is whether the learned Judge below was right in holding that the defendant is

in law liable in respect of the injuries caused to the plaintiff. The plaintiff, as we have said, was a bare licensee, and the defendant in driving him was giving his services gratuitously as a friend. In these circumstances, it is contended for the defendant that no liability can attach to him unless he is shown to have been guilty of gross negligence, of something amounting to culpable default, and that in law he is not liable for mere want of foresight or mistake of judgment. In support of this contention, Mr. Setalvad has cited *Moffatt v. Bateman* (1) and *Giblin v. McMullen* (2). If the law laid down in these decisions caused any embarrassment to the present plaintiff in the facts underlying this appeal, it might be relevant to observe that *Giblin v. McMullen* (2) was not a case of an accident at all, and that in *Moffatt's* case (1), the judgment was largely based upon the consideration that the evidence did not disclose any tenable theory to explain how the accident arose. In our opinion, however, it is unnecessary to pursue this subject, because this case must be decided on its own facts, and those facts are decisive against the defendant even on the assumption that the rulings in the two cited cases are applicable without reservation or qualification. In other words, it is unnecessary here to attempt either to fix the precise difference between negligence and gross negligence, or to define the exact degree of the defendant's liability. For, in our view, on the facts of this case, the defendant's negligence and carelessness were such that, putting the law as to his responsibility most favourably to him, it is impossible to acquit him of liability: assuming that gross negligence amounting to culpable default is required, then we think we have it here.

It appears to us however that the determination of this point of law will be facilitated if we consider not so much the degree of negligence which would expose the defendant to liability as the nature of the positive duty, which, in the circumstances of this case, was cast upon him. Upon this aspect of the

(1) [1869] 22 L. T. 140=3 L. R. P. C. 115=6 Moor. P. C. 369.

(2) [1868] L. R. 2 P. C. 317=5 Moore. P. C. (n. s.) 484=38 L. J. P. C. 25=21 L. T. 214=17 W. R. 445.

matter, we have the guidance of the Earl of Halsbury's "Laws of England" (Title 'Negligence', Art. 641). Mr. Setalvad admits that the driving of a motor car is a business or occupation requiring skill, and undoubtedly the defendant had that skill: that being so, and he being a volunteer, the article cited lays down that he was bound to act to the best of his skill, which must be such as a person skilled in such matters may reasonably be expected to possess. Reference may be made to *Wilson v. Brett* (3), where the point is illustrated. That was a case where the defendant, who was skilled in the management and riding of horses, rode the plaintiff's horse gratuitously at the plaintiff's request in order to show the horse for sale. In riding over slippery ground, the defendant let down the horse and injured him by breaking his knee. The jury found for the plaintiff, and on a motion for a new trial on the ground of misdirection, Parke, B., stated the law thus in his judgment: "The defendant was shown to be a person conversant with horses, and was therefore bound to use such care and skill as a person conversant with horses might reasonably be expected to use: if he did not, he was guilty of negligence. The whole effect of what was said by the learned Judge as to the distinction between this case and that of a borrower, was this: that this particular defendant, being in fact a person of competent skill, was in effect in the same situation as that of a borrower, who, in point of law, represents to the lender that he is a person of competent skill. In the case of a gratuitous bailee, where his profession or situation is such as to imply the possession of competent skill, he is equally liable for the neglect to use it." And Alderson, B., gave judgment to the same effect. In our present case, the defendant was admittedly a person of competent skill in driving a motor car, though the evidence suggests that he was a nervous driver; moreover he placed himself in a situation which implied the possession of competent skill.

If this is a correct statement of the law, the only question which remains is whether the defendant

at the critical point of the drive exercised such skill as a person skilled in driving motor car may reasonably be expected to possess. We entirely agree with Macleod, J., that this question must be answered in the negative. In our opinion, the evidence establishes that the sole cause of the disaster was the excessive and reckless speed at which the defendant was driving. It appears to us that this explanation is the only reasonable explanation of the proved or admitted facts, and is also the explanation which defendant himself offered immediately after the accident. It is not easy to feel quite confident as to the details of the defence which is now attempted; but the gist of it appears to lie in the assertion that, as the defendant approached the level crossing, only the left hand gates were thrown open for his passage, and that the roadway was thus so blocked that even at the eight or nine miles an hour at which he was travelling he was unable to turn the car after it had passed the farther gate.

Upon the evidence it is, we think, not possible to hold that the incident occurred in this way. It is however material to note that, on his own showing, the defendant, at least by the time he had reached the crossing, became aware of the proximity of the oncoming express, and accelerated his speed on this account. It might at first sight seem that this was a very plausible admission, and, being to some extent against the defendant's own interest, should be accepted as the whole truth; but it is to be observed that in view of the defendant's first statements made on the Igatpuri platform in the presence of such independent witnesses as Cherry and Arnot, it was not open to the defendant to avoid the admission that he quickened his speed at or about the crossing.

The foundation of the defendant's case as made in this appeal lies in the contention that on his approaching, the crossing the right hand gates were closed to him, that he had to pass through the left hand gates, which alone were opened to him, and that in consequence his course was fatally hampered. It is very possible that the defendant, in the moment of confusion and danger, did not really

(3) [1849] 11 M. & W. 118=12 L. J. Ex. 264=63 R. R. 528.

observe the condition of the gates, but in any event we are satisfied that his present account of their position is incorrect. His own best witness, indeed the only witness on the defendant's side who inspires us with any confidence as to the circumstances of the accident, is Mr. P. S. Taleyarkhan, who was driving the Renault car containing the other members of the excursion. Mr. Taleyarkhan, who crossed the railway a minute or two before the defendant came up in the steam car, deposes that the right hand gates were opened for him and that he had no difficulty in keeping to the road; it is indeed admitted by Mr. Setalvad, and is manifest from the plans, that the crossing and turning present no more difficulty if the right hand gates are open than if all the gates are open, and defendant's case confessedly depends upon the theory that the left side gates, and they alone, were open. Now the evidence is practically uniform that, just after Taleyarkhan had crossed, the gateman was proceeding to shut the opened right gates, when he heard the defendant's horn and, suspending the operation of closing the gates, he at once threw them open. It is, in our judgment, not believable that at such a juncture the gateman should have taken the useless trouble to finish closing the half closed right gates in order that he might open the less convenient left gates which were fast shut. Further, if we were forced to suppose that the gates on one side only were opened, it is reasonably certain that they would be the right hand gates; they gave the driver a very much more convenient access as the gateman must have realized, and realized the more readily, as the road is frequented by motor cars. Even on this footing therefore the defendant's case fails.

- But upon the evidence we see no escape from the conclusion that all four gates were thrown open to the defendant's passage. We do not for a moment suggest that Mr. Taleyarkhan is not telling the truth to the best of his recollection, but if, as he admits, he found the right hand gates open, he would not be concerned to observe whether the left gates were open or shut, for their position would have been a matter of no moment to him. However

that may be, we find that in fact all four gates were opened for the defendant. This finding seems to be established by the independent witnesses, Shivram Cupe, Gangaram Dagdu, and Gadpat Bhau. These men, who are Hindu and have no interest in the success of either party, are not shaken in cross-examination; their statements carry conviction to our minds, and they were believed by the learned Judge who heard and saw them. We do not seek to fortify them by the similar testimony of the chauffeur, Shekh Lal Mahomed, because there are passages in his deposition which lead us to doubt whether he is telling the whole truth. But we rely upon Shivram, Gangaram and Ganpat; and these witnesses prove not only that all four gates were opened for the defendant, but that the defendant came up to the crossing and passed over it at excessive speed. There is all the more reason to accept this evidence as to excessive speed because it really derives confirmation from defendant's own version. Admittedly, he accelerated because he knew the train was approaching: the only question is, When did he do so? He says he did so on reaching the first rail at the crossing while the plaintiff's witnesses declare that he came up to the crossing at high speed. Now Mr. Arnold's testimony and the other evidence prove that the lowered signal, which, apprising the defendant of the approach of the train, led him to increase his speed, would have been seen long before he reached the crossing; and, in any event, if he was safely on the crossing going at seven or eight miles an hour, with no train in sight, his passage was assured, and there was no need to quicken the speed. There are also three other facts disclosed upon the evidence which, as we think, corroborate the plaintiff's case of excessive speed, and are scarcely reconcilable with the defendant's version: these facts are, first, that, with the exception of the defendant who had hold of the steering wheel, all the occupants of the car were shot violently out; secondly, that the car did not run down, but jumped, the fairly easy slope of the bank down from the road into the field; and thirdly, that the car ran on for a distance of as much as thirty feet into the soft, muddy paddy field.

Turning now to the account which the defendant himself gave of the event shortly after its occurrence and before he had had time to "think a lot over the causes of the accident," as in his own words he has since done, we find this account established by the two independent witnesses, Arnot and Cherry. No attempt has been made by defendant's counsel to discredit these gentlemen in any way, and indeed the most that the defendant himself can allege against them is that they do not report his statements verbatim. That may be so, but we think that no one who reads the depositions of these witnesses fairly without any effort to evade their plain meaning, can fail to understand their significance. "He said," says Mr. Cherry, referring to the defendant, "he either saw or knew the train was coming. He saw the gates open, and hurried on to get through before the train. He was unaware of the turn to the right and went straight on." Mr. Arnot confirms this account, and there can be no doubt of its truth. We have it therefore that within a few hours of the occurrence the defendant in explaining it attributes it to his own haste in trying to rush through the open gates and to his ignorance of the abrupt turn; that, in our judgment, is enough to dispose of the theory that any gates were closed against him, or that his speed was within the limits set by ordinary prudence. It may be added that this almost contemporaneous explanation makes no mention of muddy roads, of the car being bumped badly over the rails, of the gear being loose, or of any other matter on which the defendant's case is now sought to be based. The occurrence is attributed to two causes only, high speed and the driver's carelessness as to the character or direction of the invisible road in front of him. We have no doubt that these causes, and these alone, led to the disaster which the defendant himself has such good reason to deplore.

As to the evidence called for the defence, it is unnecessary to add much to what has already been said. Upon the defendant's own testimony, it is, as we have indicated, not possible to rely; that may well be because his observation at the time of the sudden disaster was imperfect or because, on looking

back at these events and pondering over them from his own point of view, his memory has betrayed him. But the result is that his version of the disaster cannot be accepted. And in the circumstances of the case we cannot concede that that version derives any increased plausibility by reason of the fact that it is more or less supported by the defendant's own wife and her father. Nor is the balance of the evidence materially affected by the testimony of the boy, Kaikobad Mody, who admits his sense of obligation to the defendant, or of Temuras Mody who is apprenticed to the defendant and is working under his manager. As to Mr. Taleyarkhan, his evidence, in so far as it tells in the defendant's favour, has already been considered.

On a consideration of the whole evidence therefore we are bound to agree with the conclusion of the learned trying Judge that the sole cause of the disaster was that the defendant, in order to get ahead of the coming train, drove to the crossing and over it at excessive speed, and in total disregard of the need for caution imposed by the fact that the road in front of him was hidden from his view on account of the abrupt turning. In these circumstances, we cannot doubt that, putting the skill and caution exigible from the defendant at their very lowest, he was grossly and culpably negligent. It follows that he is liable in damages.

As to the amount of damages which should be awarded, the learned Judge has allowed Rs. 8,000 on the score of expenses, Rs. 10,000 on the score of pain and suffering, and Rs. 20,000 on the score of loss of income, past and prospective. All these items have been canvassed by Mr. Setalvad for the defendant, but we have heard no argument which would justify us in interfering with the damages allowed under the two last-mentioned heads. The plaintiff is a young man who had a career of good promise before him. That career has been ruined; he has already suffered intense pain and is likely to suffer in the future; he is crippled for life and his means of earning a fair income in the future, if they have not been destroyed, have been lamentably reduced. Therefore on neither

of these heads can the damages awarded be regarded as excessive.

We think however that a reduction of Rs. 2,000 should be made from the Rs. 8,000 which Macleod, J., allowed for expenses. The details supplied by the plaintiff in Ex. 10 show that these expenses have been calculated on a somewhat extravagant scale, yet the plaintiff's own estimate is exceeded by the learned Judge by about Rs. 400. We cannot allow Mr. Setalvad's contention that the plaintiff was not justified in going to England at all for treatment, seeing that he was advised to do so by his own Surgeon, Dr. Masina, a gentleman of acknowledged professional skill. But the expenses incurred while in England on account of hotel and other charges and various sums debited on account of board and lodging, clothing, and expenses at Deolali seem to us to be exaggerated, and upon consideration of the evidence and the arguments on these points we think it right to reduce the Rs. 8,000 on this head to Rs. 6,000.

The result therefore is that the only alteration to be made in the decree is that the damages allowed to the plaintiff are to be Rs. 36,000 instead of Rs. 38,000; in other respects the decree under appeal is affirmed.

As to costs, each party will bear his own costs of the last day's hearing of the appeal, and all other costs in the appeal must be borne by the defendant-appellant.

G.P./R.K.

Appeal dismissed.

A. I. R. 1914 Bombay 223

SCOTT, C. J., AND BATCHELOR, J.

Manilal Popatlal—Plaintiff—Appellant.

v.

Khodabhai Sartansing—Defendant—Respondent.

Second Appeal No. 342 of 1912, Decided on 6th March 1914, from decision of Dist. Judge, Ahmedabad, in Appeal No. 219 of 1911.

(a) *Bombay Gujarat Talukdars' Act (1888), S. 29-B*—A's claim to assert mortgagee's rights negatived in lower Court—After appeal property passing under management of Talukdari Settlement Officer—Call of claims from claimants within six months of notification—Appeal heard some months after notification and decided in A's favour, —Settlement officer's appeal against appellate decree failing—Application for certi-

ficate under S. 29-E to proceed with execution of decree —A held to be unable to put forward his claim at date of notification.

A asserted that he was entitled to exercise the rights of a mortgagee in respect of certain property. The claim was negatived in the Subordinate Judge's Court. A appealed. After the appeal was filed the property passed under the management of the Talukdari Settlement Officer under the Gujarat Talukdari Act, who issued a notification under S. 29-B, of the Act calling upon claimants to submit their claims within six months. A's appeal did not come on for hearing until some months after the notification but when heard it was decided in his favour. After the period of six months from the date of the notification had expired the officer, as representing the estate to which the property belonged, appealed against the appellate decree. That appeal failed. A therefore applied under S. 29-E of the Act for a certificate in order that he might proceed with the execution of the decree.

Held: that A was unable to put forward his real claim at the date of the notification, that at the date of the notice he was unable to comply with it within the meaning of S. 29-B (3), and that the inability continued during the period of six months from the date of the notification. [P 224 C 2]

(b) *Bombay Gujarat Talukdars Act, (1888); S. 29-B*—"Unable" meaning of.

The word "unable" in S. 29-B is not confined to physical inability on the part of the claimant. [P 224 C 1]

Inverarity, M. K. Mehta and N. K. Mehta—for Appellant.

G. S. Mulgaonkar—for Respondent.

Judgment.—In the year 1904 the plaintiff Chhaganlal Kishordas sued the respondents, who were minors represented by the Talukdari Settlement Officer as their guardian, for a decree upon a mortgage. In 1905 the Subordinate Judge granted him a personal decree only for Rs. 2,360 and costs but the mortgage was held to be invalid under the provisions of the Gujarat Talukdars' Act. On 27th September 1905 the plaintiff filed an appeal. On 21st November 1905, the Talukdari Settlement Officer took over the management of the estate under the Gujarat Talukdars' Act. On 24th of the same month notice of the plaintiff's appeal was given to the Talukdar Settlement Officer, and on 28th December that officer issued a notification under S. 29-B of the Gujarat Talukdars' Act calling upon claimants to submit their claims within six months of the date of the notification. On 14th March 1906, the District Court decided the appeal in favour of the plaintiff, holding that he had a valid mortgage upon the property of the

defendants, and on the 16th of that month on the application of the office of the Talukdari Settlement Officer a copy of the District Court's decree was sent to him. Then in July, after the period of six months from the date of the notification had expired, the Talukdari Settlement Officer as representing the defendants, appealed against the District Court's decree. That appeal failed. The plaintiff thereafter applied under S. 29-E of the Gujarat Talukdars' Act to the Talukdari Settlement Officer for a certificate in order that he might proceed with the execution of the decree. He received a reply on 12th August 1908 that as he had not submitted his claim within six months of the date of the publication of notice under S. 29-B his claim was deemed to have been fully discharged, and therefore his request for the grant of a certificate would not be complied with. After one month from the date of the receipt of that reply the plaintiff has applied to the Court for execution.

The Talukdari Settlement Officer relies upon the provisions of S. 29-B (3) that "every claim not submitted in compliance with a notice shall, save in certain cases, be deemed, for all purposes and on all occasions, whether during the continuance of the management or afterwards, to have been duly discharged." That provision however is subject to an exception stated in the same section in these words: "Unless in any suit or proceeding instituted by the claimant, or by any person claiming under him, in respect of any such claim, it is proved to the satisfaction of the Court that he was unable to comply with the notice published under sub-S. (1)."

We have now before us a proceeding in execution instituted by the claimant, and the question is whether he has proved to the satisfaction of the Court that he was unable to comply with the notice of 28th December 1905. The learned Subordinate Judge was of opinion that the inability must be some physical inability on the part of the claimant. If that is so, it is difficult to understand why physical inability should be an excuse where a suit has been instituted and not an excuse where a suit has not been instituted. We are therefore of opinion that the word "unable" is not confined to physical inabi-

lity on the part of the claimant. Now at the time of the notice on 28th December 1905, what was the claimant's position? He had asserted that he was entitled to exercise the rights of a mortgagee in respect of certain property belonging to the defendants, who were represented by the Talukdari Settlement Officer, and whose property on 21st November passed under the management of that officer under the Gujarat Talukdars' Act. His claim had been negatived in the Subordinate Judge's Court, but he had appealed to the District Court and that appeal did not come on for hearing until some months after the notification under S. 29-B. How then could he advance his real claim at the date of the notification? The first Court had held that the claim, which he contended he was entitled to put forward, was an invalid claim. But he did not accept that decision. But if he had put forward his mortgage claim before the Talukdari Settlement Officer that officer would have at once met him by the decree in which he had only been granted a decree for money and costs. We think therefore that he was unable to put forward his real claim at the date of the notification, and at the date of the notice he was unable to comply with it within the meaning of S. 29-B (3). The period allowed to the Talukdari Settlement Officer for appealing against the decree of the District Court enabled that officer to keep the matter of the finality of the District Court's decree in dubio until after the expiration of six months from the date of the notification, and then, when that period had elapsed, he filed an appeal to the High Court. Under these circumstances we think that the inability of the claimant continued during that six months. We therefore decide the case against the Talukdari Settlement Officer without taking into consideration the injustice of the contention that he has received no notice when he was actually a litigating party in the proceeding in which the claim was finally settled. If the claim had been duly discharged under S. 29-B (3) it is difficult to understand why the Talukdari Settlement Officer took the trouble to appeal to the High Court. The plaintiff must have his costs throughout.

G.P./R.K.

Appeal accepted.

A. I. R. 1914 Bombay 225 (1)

HEATON AND SHAH, JJ.

In re Visa Samta—Applicant.

Criminal Revn. Appln. No. 245 of 1914, Decided on 1st October 1914, from order of Acting District Magistrate, Ahmedabad, in Criminal Misc. Appln. No. 12 of 1914.

Criminal P. C., (5 of 1898), S. 517 — Complaint of theft dismissed owing to uncertainty of ownership of stolen property—Proper order is of sale of property.

Where a complaint of theft brought on behalf of a talukdar against his tenants in respect of some fallen trees which the tenants had cut down and taken is dismissed on the ground of uncertainty of ownership, the proper order to be passed with regard to the wood is that it should be sold if it has not been already sold, and the proceeds should be retained by the Court until they are shown to be payable to one or other of the parties, either in virtue of a decree of Court or in virtue of an agreement amongst themselves.

[P 225 C 2]

H. V. Divatia—for Applicant.

N. K. Mehta—for Complainant.

S. S. Patkar—for the Crown.

Judgment.—In this case the talati of a certain village on behalf of the talukdar brought a complaint of theft against one of the tenants of the talukdar in respect of some fallen trees which the tenant had cut down and taken. The trying Magistrate disposed of the matter in favour of the accused so far as the matter of the offence went. But he ordered the property (the wood) to be restored to the complainant. The matter came before the District Magistrate with reference to this order about the property. The District Magistrate at first said :

"In these circumstances I think it would have a salutary effect if I directed that the wood be sold and the proceeds credited in the treasury as a criminal deposit to be paid to such one of the parties who shall bring either a decree of a competent Court or a consent of all the other parties."

However, he did not give effect to this intention. He had the matter argued before him, and then he decided as appears from this part of his judgment :

"On the whole, since I expect that in the event of a case being instituted in a civil Court the talukdars would be adjudged to be the proprietors of the trees no great harm will be done by allowing the Magistrate's order to stand. I cannot, however, express too strongly my hope that the Sanad Magistrates will, in future, when criminal complaints are made of theft in cases where there is a bona fide dispute about property, and especially

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in the case of these trees at Garodia, dismiss the complaint under S. 203."

We think the District Magistrate is right in emphasizing the necessity for not treating cases of this kind as if they were criminal cases. By allowing the complainant to take the wood however he has secured to him one of the chief advantages to be gained by this very bringing of the complaint which he so strongly deprecates. On the other hand to allow the wood to be taken by the accused would be to disregard the only decision that there is on the question of ownership of the trees, that is the decision arrived at by the Survey Settlement Officer that the talukdar is the owner.

We think that the order originally proposed by the District Magistrate is quite the best in this case. We cancel the order he has made and in its place make that order which the District Magistrate originally thought was the best i. e., that the wood should be sold if it has not been already sold and the proceeds should be retained by the Court until they are shown to be payable to one or other of the parties either in virtue of a decree of Court or in virtue of an agreement amongst themselves.

G.P./R.K.

*Order modified.***A. I. R. 1914 Bombay 225 (2)**

SCOTT, C. J., AND BATCHELOR, J.

Baroda Spinning and Weaving Co. Ltd.—Plaintiffs—Appellants.

v.

Satyanarayan Marine and Fire Insurance Co. Ltd.—Defendants—Respondents.

Original Appeal No. 75 of 1912, Decided on 19th August 1913, from decision of Beaman, J., D/- 26th November 1912.

(a) Contract Act (1872), S. 28—Fire insurance policy containing condition that if claim be rejected and suit be not commenced within three months after rejection all benefit to be forfeited—Condition held not within scope of S. 28.

One of the conditions in a policy of fire insurance sued on by the plaintiff was that if the claim be made and rejected, and an action or suit be not commenced within three months after such rejection, all benefit under the policy shall be forfeited.

Held : that the condition of forfeiture was not within the scope of S. 28, and hence a suit commenced more than three months after the rejection of the claim under the policy was not maintainable.

[P 228 C 2]

(b) Contract Act (1872), S. 28—"Thus enforce his rights" refer to enforcement by usual legal proceedings.

The phrase "thus enforce his rights" in S. 28, refers to the enforcement by the usual legal proceedings in the ordinary tribunals.

[P 229 C 1]

Strangman & Kanga — for Appellants.

Bahadurji and Desai—for Respondents.

Beaman, J. — (26th Novr. 1912)

—The preliminary issue I am asked to try arises upon Cl. 12 of the conditions of the policy upon which the plaintiffs are suing. Amongst other terms, it is agreed between the parties under Cl. 12 that if, after a claim had been made and rejected, the insured should not institute any proceedings within three months from the date of such rejection, he is to forfeit all benefits under the policy. It is conceded that this suit was not instituted within three months from the date of the rejection of the plaintiffs' claim, and I may observe that this is only one of the several technical defences upon which the claim is resisted.

The plaintiffs have been compelled to rely mainly upon S. 28, Contract Act. It is contended that that section makes every agreement of the kind contained in Cl. 12, and now relied upon by the defendant company, void. This contention, unfortunately for the plaintiffs, appears to me to be covered by authority which is binding upon me: *Hira Bhai v. Manufacturers' Life Insurance Company* (1). The case there was much stronger because the words of the clause relied upon by the company undoubtedly on the face of them were restricted to limitation. The agreement was that no suit should be brought upon the policy after the expiration of one year after the cause of action accrued. But the learned Judges of the appeal Court apparently found no difficulty in coming to the conclusion that such an agreement was not within the scope or intention of S. 28, Contract Act, and neither conflicted with it in principle nor in language. The reason of the decision, which is of a broadly general character, appears to be: first, that clauses of this kind in policies of insurance need not be interpreted literally but with special reference "to the object and exigencies of insurance;"

(1) [1912] 15 I. C. 1001.

secondly, that although in form agreements of this kind appear to limit the period within which suits can be brought to enforce rights under the policy, they in substance amount to a waiver of the rights of the insured subject to the condition, and, therefore, go much further than merely barring the remedy. The decision, therefore, appears to me to be of a general character and to support the defendants' contention here that the particular clause upon which he relies is not void by reason of anything contained in S. 28, Contract Act. The language of the clause in this case is far more favourable to the defendants having regard to the reasoning which seems to have commended itself to the learned Judges in the case of *Hira Bhai v. Manufacturers Life Insurance Company* (1), for here the insured agrees, that on failure to institute proceedings within three months of the rejection of his claim, he will forfeit all the benefits to which he might otherwise be entitled under the policy; and the use of such language might give some colour to the distinction upon which the learned Judges rely for taking all contracts of this kind out of the scope and intention of S. 28. It is not for me to state critically all the reasons that might be adduced against the conclusion, which I feel to be binding upon me. It is enough for me to say that after having given the reasoning of the learned Judges in that case my fullest and most careful attention, I am still of opinion, with the greatest deference, that there is room for very grave doubt whether the case was rightly decided; for there can, I think, be no doubt at all but that it does decide the contention upon which the plaintiffs here mainly rely, and as it is a decision of this Court it is binding upon me. I must, therefore hold, however reluctantly, that the condition in Cl. 12 is not void under S. 28, Contract Act.

The only other ground upon which the plaintiffs were able to argue that the case ought not to be defeated under that clause was that on the face of it it is a forfeiture clause and that the time specified ought not to be regarded as of the essence of the contract. I am unable to accede to that argument. Rightly or wrongly clauses of this kind

are usually inserted in policies of insurance for a reason which widely commends itself to the business interests directly involved, viz., that all claims of these kinds ought to be made at the earliest possible date and in any case while they are still fresh. If then contracts of the kind are permissible at all, notwithstanding S. 28, Contract Act, it would appear that their only value could lie in their being literally enforceable. If the insurer and the insured, notwithstanding Art. 86, Sch. 1, Limitation Act, and S. 28, Contract Act, may agree that the insured is only to sue within three months of the final rejection of his claim by the insurer, then it appears to me idle to say that the Courts may give the go-by to the period so fixed and substitute for it any other period which they may deem reasonable. The law must in all cases be presumed, at any rate in Courts of law, to be reasonable. So that it would amount to this, that the period prescribed by the law of limitation would always be a reasonable period, and once the actual terms of the limiting agreement were overstepped it would be impossible to make any distinction between the relations of the parties under such an agreement and under the general law of limitation.

Lastly, I am to observe upon this defence that the plaintiffs have not the same ways to meet it which they intended to use against the other technical defences set up against him. Whatever may have been the conduct of the agent and representatives of the defendant company, and however that conduct may have affected their defence under Cl. 10 of the conditions, it is conceded that for the purposes of this argument no evidence of conduct would be relevant to or could possibly affect the decision; for on 20th April the defendant company, whether honourably or dishonourably, did flatly reject the plaintiffs' claim and thereafter it was for the plaintiffs to comply with the condition set forth in Cl. 12. I have come to this conclusion with the utmost reluctance because, after having heard the case opened and considered the principal defences set up by the defendant company, it was impossible to doubt in reference to those defences

that the attitude and conduct of the defendant company from first to last have been most dishonest and unfair to the plaintiffs, and, speaking for myself, nothing would give me greater pleasure than if the appeal Court, should this question be taken there, were to hold that the decision I have come to upon this preliminary issue is wrong and so reopen the case for further trial upon its merits. In case however it should stop here I have only to add that I am sure that were all the pleadings and the opening statements and arguments of counsel fully communicated to the public, the public would be very reluctant to have further dealings with the Swadeshi Company.

Having regard to the fact that I am now about to dismiss the suit not in accordance with my own conviction but merely because I feel myself bound by the decision of a superior Court, and having regard to the very strong opinion I have just expressed, an opinion formed, I admit, only upon the material so far laid before me, I shall, in dismissing the suit of the plaintiffs upon this preliminary issue, leave each party to bear their own costs.

Scott, C. J.—One of the conditions in the policy of fire insurance sued on by the plaintiffs is that, "if the claim be made and rejected, and an action or suit be not commenced within three months after such rejection, all benefit under this policy shall be forfeited."

The claim of the defendants was rejected on 20th April 1911, but the suit was not commenced till 14th August 1911. Upon this ground the suit was dismissed in the lower Court. That such a condition is not unreasonable or opposed to public policy is conceded by the appellant's counsel and can hardly be disputed in view of the remarks of the Judicial Committee in *Home Insurance Company of New York v. Victoria-Montreal Fire Insurance Company* (2). But it is argued that the condition is void as an agreement of the nature described in S. 28, Contract Act, since it limits the time within which a party to the contract may enforce his rights under the contract by the usual legal proceedings.

(2) [1907] A. C. 59=76 L. J. P. C. 1=95 L. T. 627=23 T. L. R. 29.

The section contemplates the suspension, permanently or temporarily, of the usual remedies for the enforcement of legal rights. It aims at the prohibition of agreements which could only operate so long as rights were in existence. The argument of the appellant's counsel was that the forfeiture clause was equivalent to an agreement that no Court should entertain any suit on the policy unless commenced within three months of the rejection of the claim. The steps in his argument were: S. 3, Lim. Act, indicates that the law of limitation cannot be modified by agreement of parties as it can in England; that there is no distinction under that Act between rights and remedies; and that a conditional agreement to forfeit rights within the period within which the remedy is not barred by the limitation law is a void agreement.

I cannot accept the proposition that there is no distinction in India between rights and remedies. S. 28, Lim. Act, shows the cases in which the loss of the remedy will destroy the right but that does not cover suits for money such as we are now concerned with. On the other hand the loss of the right always involves the disappearance of the remedy, a very material consideration in the case of a conditional forfeiture of all benefit under a policy.

In my opinion S. 28, Contract Act, is aimed only at covenants not to sue at any time and covenants not to sue for a limited time, which had given rise to difficulty in England: see the judgments of the Exchequer Chamber in *Ford v. Beach* (3); *Beach v. Ford* (4); *Gibbons v. Vouillon* (5); *Newington v. Levy* (6); and the judgments in *Slater v. Jones*, and *Capes v. Ball* (7). A conditional release or forfeiture was a very different thing from a covenant not to sue, although in order to avoid circuity of action a covenant not to sue was some-

times held to be equivalent in effect to a conditional release. For this reason I share the doubt of Beaman, J., as to the correctness of the decision of *Hira Bhai v. Manufacturers Life Insurance Company* (1), where the agreement was that "No suit shall be brought against the company in connexion with the said policy later than one year after the time when the cause of action accrues." As however the condition of forfeiture which we have to deal with here is not, in my opinion, within the scope of S. 28, I would affirm the decree, and with costs, for the reasons given by the learned Judge, for disallowing costs to the successful defendants do not appear to me adequate.

Batchelor, J.—This suit was brought by the plaintiff company to recover from the defendant company a sum of Rs. 4,297-13-6 as the amount payable by the defendants under a policy of insurance issued by them to the plaintiffs. Numerous defences were raised, but the suit was dismissed by Beaman, J., upon a preliminary issue. That issue arose upon Cl. 12 of the conditions of the policy which provided, inter alia, that "if the claim be made and rejected, and an action or suit be not commenced within three months after such rejection, all benefit under this policy shall be forfeited." The facts admittedly are that the plaintiff company's claim was made and rejected by the defendants, and that this suit was not commenced until after the expiry of three months after such rejection. The suit was however instituted within the period allowed by the law of limitation; consequently, so far as regards the preliminary issue, the suit is free from objection unless the defendants can successfully rely, as they seek to rely, upon the special terms of Cl. 12 of the conditions. For the plaintiffs, it was contended that the provisions of this clause, as cited above, could not be pleaded in bar of the suit because those provisions constituted a void agreement under S. 28, Contract Act. The learned Judge below, though with expressed reluctance accepted the argument for the defendants holding himself bound to do so by the decision of the Bench in *Hira Bhai v. Manufacturers Life Insurance Co.* (1). He, accordingly, made a decree dismissing the suit, and from that

(3) [1848] 11 Q. B. 842=116 E. R. 689=75 R. R. 632=5 D. & L. 610=17 L. J. Q. B. 114=12 Jur. 310=116 E. R. 693=75 R. R. 638.

(4) [1848] 7 Hare 203=69 E. R. 85=82 R. R. 69.

(5) [1849] 8 C. B. 483=7 D. & L. 266=19 L. J. C. P. 74=14 Jur. 66=137 E. R. 596=79 R. R. 593.

(6) [1870] L. R. 6 C. P. 180=40 L. J. C. P. 29=23 L. T. 594=19 W. R. 473.

(7) [1873] L. R. 8 Ex. 186=42 L. J. Ex. 122=29 L. T. 56=21 W. R. 815.

decree the present appeal is brought. The point involved, though in itself a short one, and, not I think, susceptible of much useful elaboration, cannot be said to be free from difficulty. We have to make our election between two rival arguments, each of which may be said to possess at least plausibility. As a member of the Bench by which *Hira Bhai's* case (1) was decided, I wish shortly to explain the effect produced on my own mind by the somewhat more thorough argument of which we have had the advantage in this appeal, and by the further consideration which I have been able to give to the question.

Section 28, Contract Act, provides as follows :

"Every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent."

The phrase "thus enforce his rights" refers, I understand, to the enforcement "by the usual legal proceedings in the ordinary tribunals."

The question is whether the agreement in Cl. 12 of the conditions is void under this section. As I understood the argument for the appellants, the learned Advocate-General, while admitting what has often been decided, that the Indian Limitation Act operates in such a case as this not to extinguish rights but only to bar remedies, contended that for the purposes of this appeal we should look rather to the substantial effect intended by the section than to the precise form of words which the legislature has used. The argument was that, however valid and important in law be the distinction between the barring of a remedy and the extinguishment of a right, yet to the man of business it is much the same thing whether his right be gone or the remedy for enforcing that right be barred, and it was urged that in substance and effect there was no appreciable distinction between saying "I agree that upon the expiry of three months after the rejection of my claim, my rights shall be forfeited," as is said here, and saying "as to the time within

which I may enforce my right, I agree to limit it to the period of three months, after the rejection of my claim," and this latter covenant would undoubtedly be void under the section. In my opinion, however, the distinction, which beyond question exists, is vital in the construction of the section. As I understand the matter, what the plaintiff was forbidden to do was to limit the time within which he was to enforce his rights; what he has done is to limit the time within which he is to have any rights to enforce; and that appears to me to be a very different thing. This seems to have been the view which was tacitly accepted by the Calcutta High Court in the *South British Fire and Marine Insurance Co. v. Brojo Nath Shaha* (8), though it must be admitted that that decision is of no direct assistance, since the question of the effect of S. 28, Contract Act, on such agreements was not expressly considered.

It was conceded in argument that in England the agreement in Cl. 12 would be perfectly valid; and it cannot, I think, be contended that Insurance Companies in India have less need than such companies in England of the protection afforded by an agreement for the acceleration of legal proceedings to be brought against them. That being so, there is the less reason to suppose that the legislature intended S. 28 to have the far reaching effect for which the plaintiffs contend. I am aware that, under the authority of the *Bank of England v. Vagliano Brothers* (9), we must be very cautious how we have recourse to the pre-existing state of the law for the purpose of interpreting S. 28, Contract Act; but in deprecating any general practice of that sort, Lord Herschell added that "if a provision be of doubtful import, such resort would be perfectly legitimate." I infer therefore that in this case, it is permissible to glance at what was the state of the law in England prior to 1872 when the Indian legislature undertook the codification of the law of contract. Reference to the authorities will, I think, disclose that there was much complexity in the law as to the validity

(8) [1909] 36 Cal. 516=2 I. O. 578.

(9) [1891] A. C. 107=60 L. J. Q. B. 145=64 L. T. 353=39 W. R. 657=55 J. P. 676.

of a covenant not to sue: see Baron Parke's judgment in *Ford v. Beech* (3). It was there held that a covenant not to sue at any time, though not in terms releasing the debtor, yet operated as a release upon the principle of avoiding circuity of action. But a covenant not to sue for a limited time operated only as a covenant, and could not be pleaded as a release: *Thimbleby v. Barrow* (10); while a covenant not to sue for a limited time, with a condition suspending the right of action during that time, was construed as a conditional release and could be pleaded in bar of a suit brought within the time: *Walker v. Nevill* (11).

There were also, as the decisions show, other incidental matters of much difficulty in this branch of the law, and I am inclined to think that the genesis of S. 28 is to be found in the Indian legislature's desire to sweep away the refinements of the then English law and to enact for India a simpler and more suitable rule. The two prohibitions in the section certainly seem to follow the distinction made in the English cases, and, if that is so, the prohibition of the limitation of time within which a party may enforce his rights follows the English doctrine that a covenant not to sue for a limited time does not amount to a release. And if S. 28 be read as a whole, and compared with the effect of such decisions as I have noticed, it seems a probable inference that the Indian legislature considered it would be simple, and therefore more convenient, to brush away the somewhat fine distinctions of the English law by laying down the broad general rule that all agreements should be void which either absolutely restrict a contracting party's right to resort to the Courts or merely limit the time within which the rights should be enforced; in that case the phrase as to limiting the time would necessarily bear the same meaning which it has in the English Court's judgments, the meaning namely, that it is not open to a party to covenant that, while his rights subsist, he will diminish the period within which he shall be at

liberty to sue. These considerations therefore appear to me to afford an additional reason for the conclusion that the language of S. 28 has been carefully chosen so as to convey the narrower meaning to which alone the words are apt and appropriate.

For these reasons, I agree that the decree under appeal should be affirmed. I concur also in the order as to costs, as I do not find sufficient materials on the record to justify the order depriving the successful defendants of their costs.

It remains only to add a word as to *Hira Bhai v. Manufacturers Life Insurance Co.* (1). It appears to me that the case was rightly decided on the view which Chandavarkar, J., and I took of the meaning of the agreement; but I recognize that there are difficulties in the way of holding that the words of the agreement there were properly susceptible of that meaning.

G.P./R.K.

Decree confirmed.

A. I. R. 1914 Bombay 230

HEATON AND SHAH, JJ.

In re Sangappa Gadigeppa—Applicant.

Criminal Revn. Appln. No. 228 of 1914, Decided on 30th September 1914, from an order of Sess. Judge, Khandesh.

(a) Criminal P. C. (1898), S. 195—Sanction under S. 195 can be granted without application.

A Court can give a sanction under S. 195 even if no application is made to the Court for it. [P 231 C 1]

(b) Criminal P.C., S. 195—Defect of form. (Per Shah, J.)—Any defect of procedure or form in granting a sanction cannot convert the sanction into a complaint. [P 231 C 2]

G. S. Rao and N. V. Gohkhale—for Applicant.

S. S. Patkar—for the Crown.

Heaton, J.—This is one of five cases in which the Collector gave what he considers a sanction in each case for the prosecution of certain persons for giving false evidence. The persons against whom these assumed sanctions were given appealed to the District Judge, and he held that in accordance with the terms of Cl. 7, S. 195, Criminal P. C., the appeal did lie to his Court. That view has not been contested here. The District Judge however also held that the writing given and signed by the Collector was not a sanction, but was a complaint, and that he had no power to interfere. Against these five

(10) [1838] 3 M. & W. 210=7 L. J. Ex. 128.

(11) [1864] 3 H. & C. 408=34 L. J. Ex. 73=11 Jur. (n.s.) 246=11 L. T. 774=13 W.R. 523.

orders the applicants have come to us in revision.

Except in one point I am unable to understand why these documents are not to be regarded as sanctions. In terms they are most definitely sanctions. They fulfil, so far as I can see, every single requirement of S. 195. But apparently it has been held elsewhere that a sanction presupposes an application. That appears to me to be departing outside the terms of S. 195, and in this Court we have not acted on the assumption that a Court cannot give a sanction under S. 195, Criminal P. C., if there does not happen to be an applicant. I think therefore that as a matter of law the District Judge is wrong, that these are sanctions, and that the District Judge must deal with these appeals according to law on the assumption that they are sanctions.

But I should like to add this. Having come to the conclusion that sanctions ought to be given, I think that the Collector acted precisely as he ought to act. We have often in this Court deprecated the giving of sanctions to private persons, because we know that in certain cases they are not used as they ought to be used, but are used for the most improper purpose and in a way which brings the administration of justice into contempt. We have often advocated that sanctions, when they are given, should be given to some responsible Government servant, and perhaps of all, the most appropriate is the one which, in this case, was chosen by the Collector; and that is the Government Pleader.

The appeals must be sent back to the District Judge to be disposed of by him.

Shah, J.—I agree. I desire to add that in these cases the Collector sanctioned the prosecution of the petitioners and that sanctions were drawn up as contemplated by S. 195, Criminal P. C. I am unable to hold that the writing which purports to be a sanction under S. 195 is defective in form. In my opinion the sanction is subject to no such infirmity as is mentioned in the order of the District Judge. In any event, it is quite clear that the document which purports to be a sanction is not a complaint within the meaning of S. 195, Criminal P. C. Assuming that the sanctions granted were open to any of the objections referred to by the Dis-

trict Judge, it would be no ground for holding that it is not a sanction. Any defect of procedure or form in granting a sanction cannot convert the sanction into a complaint.

G.F./R.K.

Appeals remanded.

A. I. R. 1914 Bombay 231

BEAMAN AND HAYWARD, JJ.

Mir Gazi Sayad Kutbudin—Plaintiff—Appellant.

v.

Mir Ali Maulvi Abdul Kadir—Defendant—Respondent.

Second Appeal No. 548 of 1912, Decided on 30th June 1914, from decision of Dist. Judge, Surat, in Appeal No. 27 of 1911.

Registration Act (1908), S. 17 (2) (v) — Agreement by vendee to reconvey property is not compulsorily registrable.

An agreement by which a vendee undertakes to reconvey the property to his vendor, when called upon to do so, is nothing more than an ordinary agreement to sell and is not compulsorily registrable. [P 232 C 1]

Coyaji and P. B. Shingne—for Appellant.

D. A. Khare, M. P. Mehta and T. R. Desai—for Respondent.

Judgment.—On 9th September 1903 the plaintiff and the defendant undoubtedly intended to mortgage the property now in suit. The defendant being a good Mussalman scrupled to take interest. It was accordingly agreed that the plaintiff should nominally sell the property out and out to the defendant and thereafter attorn to him for an amount of rent which would represent reasonable interest. This conveyance was executed and duly registered. Contemporaneously the defendant executed an agreement to the plaintiff to reconvey the property for the same consideration, namely Rs. 1,499, when called upon to do so. If we look at the true intention of the parties, we should have no doubt but that this was really, though in form a sale, a mortgage. Inasmuch however, as the plaintiff very naturally did not register his part, that is to say, the agreement given to him by the defendant at the time, the Court below refused to treat the whole transaction together as a mortgage. So far defeated, the plaintiff fell back upon the alternative and claimed to have his agreement of 9th September 1903 specifically enforced against the defendant. The lower ap-

pellate Court refused to give effect to the agreement to re-convey on the ground that it was a document compulsorily registrable under S. 17, Cl. (b), Registration Act. In our opinion, the learned Judge was wrong. Separated entirely from the conveyance of the defendant we can see in this document nothing more than an ordinary agreement to sell, and such agreements are expressly exempted from the operation of S. 17, Cls. (a) and (b), Act 3 of 1877 by Cl. (h) as it stood in that section and now Excep. (v). It has been strenuously contended, on behalf of the defendant-respondent here, that, inasmuch as this agreement to reconvey contains words to the effect that on payment of the consideration the defendant is to give up the land and reconvey, there is a direct interest created by the instrument itself in the land. We think however, having regard to its form as a whole, that it is no more than an ordinary agreement to reconvey when called upon to do so, and we are the more disposed to adopt this view since there can be no doubt whatever but that the whole justice of the case is on the side of the plaintiff. We therefore think that the decree of the Court below must be reversed and that the plaintiff must now be decreed specific performance of the agreement of 9th September 1903, that is to say, that on the plaintiff paying to the defendant Rs. 1,499 within three months of the date of this decree, the defendant be ordered to reconvey the property in suit to the plaintiff and put him in possession thereof. The plaintiff must have all his costs after the remand. Up to remand the parties must bear their own costs.

G.P./R.K.

Appeal accepted.

A. I. R. 1914 Bombay 232

HEATON AND SHAH, JJ.

Emperor—Prosecutor.

v.

Narayan Ganpaya Havnik—Accused.

Criminal Refce. No. 47 of 1914, Decided on 10th August 1914, made by the Sess. Judge, Kanara.

Criminal P. C. (1898), S. 195 (1) (c)—Mamlatdar holding inquiry under Ch. 12 Bombay Land Revenue Code is revenue Court within S. 195 (1) (c)—Sanction to prosecute person

for offence respecting document in inquiry is necessary.

A mamlatdar holding an inquiry under Chap. 12, Bombay Land Revenue Code, is a revenue Court within the meaning of S. 195, sub-S. (1), Cl. (c), Criminal P. C., and sanction is necessary in order to prosecute a person for an offence in respect of a document produced before the mamlatdar in the course of the inquiry. [P 232 C 2]

T. R. Desai—for Accused.

S. S. Patkar—for the Crown.

Heaton, J.—The Sessions Judge of Kanara has referred to us a case which has been committed to him, on the ground that the commitment was illegal and ought to be quashed.

What had happened is this: after the death of a certain person, another person put forward a will which, he said, had been made by the deceased, and in virtue of this will be claimed a change in the entries in the Record-of-Rights. This claim became a disputed claim which, under rules made by the Government, had to be inquired into by the mamlatdar. The mamlatdar made his inquiry: he saw the will produced before him. He came to the conclusion that there was grave suspicion attaching to the will and he declined to recognize it as a basis for any change in the Record-of-Rights. Eventually the case was taken up by a Sub Divisional Magistrate under Cl. (c), S. 190, Criminal P. C., and was inquired into by him as a Magistrate and finally was committed to the Court of Session. As I mention his proceedings, I would like to say this: that they have been conducted in the most painstaking and thorough way and the mistake which has occurred is one which, at any rate, casts no reflection whatever on the manner in which he conducts magisterial work. The mistake is this: if the mamlatdar in making his inquiry was a "Court" within the meaning of that word as used in Cl. (c), S. 195, then a sanction or complaint was required as provided by S. 195 before this case could proceed. We have come to the conclusion that the mamlatdar in making this inquiry was a "Court." I should describe him as a "Revenue Court," but it matters very little whether you describe him in that way or as a "Civil Court." The judicial result is precisely the same in a matter of this kind. I say that he was a "Court" for these reasons: he had power to summon witnesses, to take

evidence, although it may be not to administer an oath, to consider the evidence and to make a final order which might be, as in this case, an order of great importance and would be final, unless changed by his superior on revision or appeal, until there had been a decision of a civil Court which conflicted with it. It seems to me that there are all the ingredients required for a Court in these matters that I have stated. Therefore I think that a sanction was necessary in this case. But I think it is more than a merely technical defect that there is not a sanction, and for this reason. Supposing that a person aggrieved had applied to the mamlatdar for sanction, and supposing the mamlatdar had, as he properly ought to do, called on these accused persons to show cause why sanction should not be given, and supposing then that they said, "sanction should not be given because we are about to apply for probate of this will:" if that were their reply, then I say it would be a monstrous thing for a Court forthwith to give the sanction. It might say: "I will allow you a month or two months" or whatever period might be reasonable within which to apply for probate "and if within that time you have not applied, then I shall grant a sanction." That view of the case shows, I think, very clearly that in a matter of this kind where there has been no inquiry into the genuineness of the will by a Court of probate or by a civil Court, the conducting of a prosecution without a sanction amounts to very much more than a mere technical defect.

We think that the proper order for us to make in this case is to quash the order of commitment and the whole of the proceedings before the Magistrate. And if it is determined that this prosecution should take place, it must take place with that foundation and beginning which the law requires.

Shah, J.—I am of the same opinion. The inquiry made by the mamlatdar in this case was one which he was legally empowered to make under the rules relating to the Record-of-Rights. In conducting the inquiry he could exercise the powers referred to in Chap. 12, particularly in Ss. 189 and 197, Land Revenue Code. He summoned the party interested and recorded evidence be-

fore making his order relating to the disputed entry in the Record-of-Rights. S. 96, Land Revenue Code, has no application to this inquiry, as it is neither formal nor summary under the Act. It may be therefore that the mamlatdar cannot be deemed a civil Court for the purposes of the inquiry. But I feel clear that the mamlatdar holding an inquiry as provided in Chap. 12, Land Revenue Code, is a revenue Court within the meaning of S. 195, sub-S. (1) Cl. (c). As the offence in question is in respect of a document produced before the mamlatdar in the inquiry made by him, and as there is no sanction or complaint of the mamlatdar or of any other revenue Court to which he is subordinate, it is clear that the Magistrate had no jurisdiction to take cognizance of the offence.

G.P./R.K.

Order set aside.

A. I. R. 1914 Bombay 233

SCOTT, C. J., AND CHANDAVARKAR, J.

Burjorji Dhunjibhai Contractor—Defendant—Appellant.

v.

Jamshed Khodaram Irani—Plaintiff—Respondent.

Civil Appeal No. 43 of 1912, Decided 17th February 1913, from decree of Macleod, J.

(a) Contract Act (1872), S. 5 —To render contract voidable on failure to perform promise at or before specified time intention of parties to make time of essence of contract must be shown.

According to S. 55, in order to render a contract voidable on failure to perform a particular promise at or before a specified time it is necessary that an intention be shown by the parties to make time of the essence of the contract. [P 235 C 1]

(b) Contract Act (1872), S. 55—Contract to sell providing forfeiture of earnest money and resale by vendor, upon non-completion of contract within prescribed time makes time of essence of contract.

In a contract to sell, a clause providing that upon non-completion of the contract within the fixed period the earnest money will be forfeited and the vendor will be at liberty to resell, makes time of the essence of the contract. [P 235 C 2]

Raikes, Inverarity, Desai and Tara. porewalla—for Appellant.

Kanga and Jinnah—for Respondent.

Judgment.—This is an appeal from a decree for specific performance passed by Macleod, J., at the instance of a purchaser of immovable property.

The contract for sale was made on the 8th July 1911 in the Gujarati language. The subject-matter was certain land situate at Kelva Mahim belonging to the defendant which had been taken from Government on lease for 999 years under what are known as the Gujarat Rules, the lease commencing from 1st August 1890. The purchase money was fixed at Rs. 81,000, which, by the agreement now under consideration was to be paid as to Rs. 80,500 at the time of signing the document of sale and as to the balance on the transfer of the land after registration. The provision as to the payment of the consideration money appears to have been varied by another agreement of even date under which, in lieu of Rs. 30,000, part of the consideration, the defendant agreed to take a property belonging to the plaintiff situate at Parabhadevi in Mahim within the island of Bombay. The agreement for sale contained three clauses which are of special importance with reference to the question arising in this case, viz., Cls. 2, 5 and 7 :

"2. The pakka (formal) sale (conveyance) of this land is to be prepared and received within two months from this day. And at the time of signing the document of sale, Rs. 80,500, are to be paid. And as to the balance of Rs. 500. the same is to be paid on the transfer of the land (after) the document shall have been registered.

5. On payment of Rs. 81,000 by the purchaser to the vendor, as mentioned in the above Cl. 2, the document of sale (conveyance) is to be got executed by the vendor. But should I not pay the amount within the fixed period given (herein), then I shall have no right (or claim) to Rs. 4,000 paid this day to you under this bargain paper as earnest money on account of (this) sale. And if I prefer (any) claim, the same is null (and void). And after this date the vendor of this property has authority in every way to sell the same to another.

7. The boundaries (limits) of the above property are to be shown and the (boundary marks are) duly to be made (fixed) by the vendor at his expense and are to be given to the purchaser. The grass (growing on this land for the current monsoon has been given (sold) for Rs. 10,500. The vendor is duly to

give credit for that amount to the purchaser.

The agreement was entered into at the beginning of the monsoon and the price realized by the monsoon grass-crop, which would be reaped probably in September, was to be credited to the purchaser against his purchase-money, presumably on the assumption that he would have come into possession by the time the crop was reaped. After the conclusion of the agreement, the matter was taken in hand on behalf of the plaintiff by Messrs. Little & Co. and on behalf of the defendant by Messrs. Bicknell Merwanji and Romer. The correspondence between these firms of solicitors during the first two months after the execution of the agreement show that both the parties believed completion within the time stated to be essential ; and requisitions were made by the plaintiff's Attorneys and answered by the defendant's attorneys upon that basis until the early part of September when the plaintiff changed attorneys. A change of front then took place on the part of his advisers and it was for the first time denied that time was of the essence of the contract. Objections which had been dropped by Messrs. Little and Co. were revived by their successors, Messrs. Mulla and Mulla, notwithstanding constant pressure by the vendor's solicitors and limited extensions of time until the defendant's patience being exhausted the contract was finally cancelled. Thereupon the objections which had been persisted in were waived and a suit was commenced for specific performance.

The questions arising are : Whether time was originally of the essence of the contract ; if not whether it was made so subsequently ; and if it was for either reason of the essence of the contract whether the non-completion within the time limited was due to the fault of the vendor or of the purchaser.

The learned Judge was of opinion that under the contract time was not of the essence. If, however, that is the correct conclusion, it is difficult to see with what object Cl. 5 can have been inserted which provides that if the purchaser does not pay the amount within the fixed period of two months from 8th July, he shall have no claim to the

deposit-money, and no claim under the contract, and the vendor may sell as he pleases to any one else. The law in India is contained in S. 55, Contract Act, under which, in order to render a contract voidable on failure to perform a particular promise at or before a specified time, it is necessary that an intention should be shown by the parties to make time of the essence of the contract. It is argued that Cl. 5 cannot be relied upon as a real indication of the intention of the parties having regard to the decisions of Lord Eldon in *Seton v. Slade* (1), and of Lord Romilly in *Parkin v. Thorold* (2). The contract in each of those cases contained a clause for forfeiture and resale on non-performance of conditions, but that clause had no bearing upon the decision in either case as the rescinding party was the purchaser and the clause in question was directed merely to declaring the rights of the vendor arising upon the default of the purchaser.

Where, however the vendor has rescinded the contract, a clause providing for forfeiture of the deposit and resale or for annulment of the contract has had full effect given to it, the principle being that a contract both at law and in equity must have the same meaning. Equity only did not enforce a contract where there was certain conduct on the part of one party or the other which would make it unjust to enforce the contract according to its terms. According to the report of *Lloyd v. Collett* (3), Lord Eldon said: "It is one thing to say—the time is not so essential—that in no case in which the day has, by any means, been suffered to elapse, the Court would relieve against it, and decree performance. The conduct of the parties, inevitable accident etc., might induce the Court to relieve.

But it is a different thing to say the appointment of a day is to have no effect at all; and that it is not in the power of the parties to contract

(1) [1802] 7 Ves. 265=6 R. R. 124=82 E. R. 103=2 Wh. & T. L. O. (7th Ed.) 475.

(2) [1852] 16 Beav. 59=22 L. J. Ch. 170=16 Jur. 959=2 Sim. (N. S.) 1=96 R. R. 82=51 E. R. 698=61 E. R. 239.

(3) [1798] 4 Bro. C. C. 469 at p. 472=29 E. R. 992.

that, if the agreement is not executed at a particular time, the parties shall be at liberty to rescind." In *Seton v. Slade* (1), he said: "There is no authority that has not some reference to the conduct of the party in the meantime." The later cases of *Hudson v. Temple* (4) and *Barclay v. Messenger* (5) are authorities in favour of the contention that Cl. 5 of this contract ought to be given effect to according to its terms. I am not aware, and the Court has not been informed, where the learned Judge obtained his authority for the sweeping statement that a clause providing that upon non-completion within the fixed period, the earnest-money will be forfeited and the vendor will be at liberty to resell has never been considered by the Courts as making time as of the essence of the contract.

Time, then, being in my opinion, of the essence of the contract as it was originally framed, no waiver of that condition has been pleaded by the plaintiff. The question therefore is whether the negotiations following upon the contract with reference to the making out a marketable title by the defendant disclosed any conduct on his part which would render it inequitable for him to rescind the contract contrary to the wishes of the plaintiff. From the commencement of those negotiations there had been only two points upon which the purchaser's solicitors were not immediately satisfied.

The first arose upon the terms of the lease which had been granted by Government to Mosabhai Bhikaji under which the vendor claimed title. That lease was a lease for reclamation of certain salt marsh lands under which the lessee covenanted to completely reclaim the lands so as not to allow tide or salt-water to enter upon them and to bring them under cultivation by a certain period and to maintain the reclamation for the residue of the term, and that he would not assign or underlet the lands, until the whole should have been completely reclaimed and rendered cultivable, without the pre-

(4) [1860] 29 Beav. 536=30 L. J. Ch. 251=7 Jur. (n. s.) 248=3 L. T. (N. S.) 495=9 W. R. 248=31 E. R. 699.

(5) [1874] 48 L. J. Ch. 449=30 L. T. 350=22 W. R. 522.

vious consent in writing of the Thana Collector.

The agreement for sale to the plaintiff contained the following recital: "The purchaser has seen this land and has received copies of the lease and of the Collector's reply and he has satisfied himself thereby." It is common ground that the Collector's reply referred to in the recital was a letter addressed by the Collector of Thana to the vendor which was signed on the 13th November 1906 in answer to an application that the land held by Motabhai might be transferred to the vendor. It stated (as regards the lands the subject of this suit) that as the entry of salt-water had been stopped according to the terms of the lease and paddy grain and grass were grown thereon and the same were rendered cultivable, there was no objection to the transfer, and the applicant Motabhai might arrange with the mamlatdar to have the transfer effected.

The lease itself bears an endorsement, dated 29th July 1908, signed by the Collector of Thana reciting the application of the vendor and that in accordance with the order of the 13th November 1906 the transfer had been effected to his name.

Notwithstanding these facts appearing on the title-deeds produced by the vendor the purchaser's attorneys sent in a requisition that the permission of the Collector to the proposed agreement by the lease should be obtained. The vendor's attorneys contended this was unnecessary and in answer to another requisition produced receipted bills for the Government rent or assessment up to date. The purchaser's attorneys were satisfied by 1st September that the lands agreed to be sold were identical with those referred to in the Collector's sanction and in the rent bills, and, as to the question of the Collector's permission to the proposed transfer by the vendor, confined themselves to further communications with the Collector with the result that that officer informed them on 11th September that he had no objection to the proposed assignment. At that time, the defendant had for the convenience of the plaintiff, but without prejudice, extended the time for completion until 19th September.

In my opinion, the purchaser was

never in a position to contend that the sanction of the Collector was necessary and the attitude taken up after the change of attorneys that completion must be delayed until the Collector had certified that all conditions of the lease had been complied with had no justification in face of the proof produced of payment of rent up to date: see *Bridges v. Longman* (6); *Attorney-General of Victoria v. John Ettershank* (7) and *Davenport v. Queen-Empress* (8).

The only other point as to which the purchaser's attorneys were not immediately satisfied was with regard to the devolution of the interest of one Mangalji Ishwarbhai, who had been a co-mortgagee with the defendant of the interest of Motabhai. Motabhai had mortgaged his interest under the lease to the defendant and three Hindus who contributed part of the mortgage-money on joint account. The Hindus represented, as appears from the recitals in the title-deeds, the firms of Motichand Khetsey and Raochand Oojamchand. Mangalji Ishwarbhai and Hathibhai Ishwarbhai represented Motichand Khetsey, and Nagindas Lalloobhai, Raochand Oojamchand. Mangalji died in 1904 and a conveyance of the equity of redemption by the mortgagor, on 28th October 1908, had been taken by the defendant by Nagindas Lalloobhai as representing his firm of Raochand Oojamchand and by Chimanlal Mangalji and Hathibhai Ishwarbhai as representing the firm of Motichand Khetsey.

In that document and in another document of even date, whereby the defendant became sole owner of the property by buying out his co-owners, were recitals stating that Chimanlal was the only heir of Mangalji. With reference to these recitals, the plaintiff's attorneys required evidence of the death of Mangalji and as to who were his next-of-kin and that his son Chimanlal had power and authority to sign the deed of 28th October 1908 and give a good receipt for the consideration binding on all members of the family. The defendant's attorneys' reply on 1st September 1911 was that the vendor was well acquainted

(6) [1857] 24 Beav. 27=116 R.R. 14=53 E.R. 257.

(7) [1875] 6 P. C. 354=44 L.J.P.C. 65=21 W. R. 327.

(8) [1877] 3 A. C. 115=47 L. J. P.C. 8=37 L. T. 727.

with the deceased and knew the recital to be correct but he could not produce any other evidence.

There the matter rested till 16th September when the plaintiff's new attorneys took up the requisition again. The defendant's attorneys adhered to their original position throughout in spite of frequent letters from the plaintiff's attorneys and finally when the latter realized that the defendant's patience was exhausted the requisition was dropped.

It appears to me that the attitude of the plaintiff's new attorneys was in this matter also quite unreasonable. The deeds of 28th October had been executed in Bombay by a constituted attorney of Chimanlal and Hathibhai who was a resident of Bombay and in the presence of a Bombay pleader. The recitals in the deeds indicated that the interest acquired and surrendered to the defendant by Chimanlal and Hathibhai was the interest of a firm of which one at least of the original partners Hathibhai was a party to the deeds.

There is nothing in the correspondence to show that inquiries in Bombay had suggested doubts as to correctness of the recitals or of the defendant's assurances. After 1st September 1911, the subject was not again referred to by Little and Co., as long as they acted for the purchaser. On 5th September, they wrote that the assignment from the vendor was being prepared and when ready would be sent for approval, and on the 6th the vendor's attorneys wrote in reply: "We take it that your client accepts our client's title." This appears to me to be the correct conclusion, for the purchaser's attorneys had written to the Collector on 1st September as follows:

"From your silence we gather that the Government have no objection to the assignment from Mr. Burjorji Dhunjibhoi Contractor to our above-named client of the land under Survey Nos. 835, 836, 934 and 942, leased by the Secretary of State for India and referred to in the said letter of 26th July last and that sanction is not necessary. Upon that supposition, our client will after the 7th instant complete the purchase, which please note."

And although the Collector had re-

plied in a non-committal manner on the 4th as follows:

"With reference to your letter No. 9037/11 of 1st September 1911, on behalf of your client, Mr. Jamshed Khodaram Irani, regarding the assignment of leasehold lands in the Mahim Taluka, I have the honour to inform you that your previous applications are under inquiry and a reply will be given to you on receipt of the mamlatdar's report. If in the meantime, your client makes the assignment without the Collector's permission he does it at his own risk."

Messrs. Little & Co., put the assignment in hand.

The truth seems to me to be that the plaintiff had not even on 19th September money to complete the contract according to its terms.

Having arranged to make up the price as to Rs. 30,000 by the transfer of his Parbhadevi property to the defendant, he was still in want of money and suggested on 22nd September that for the balance the defendant should finance him by taking a mortgage upon certain terms. There are various other indications in the correspondence that the defendant's real difficulty was in finding money to complete his contract.

In my opinion, the defendant was in no way to blame and was justified in putting an end to the contract under the circumstances.

The defendant is entitled to retain the deposit of Rs. 4,000: see *Howe v. Smith* (9) and *Bishen Chand v. Radha Krishan Das* (10).

We reverse the defence of the lower Court and dismiss the suit with costs throughout.

G.P./R.K.

Decree reversed.

(9) [1884] 27 Ch. D. 89=53 L. J. Ch. 1055=50 L. T. 573=32 W. R. 802=48 J. P. 773.

(10) [1897] 19 All. 489=(1897)-A.W.N.-123.

A. I. R. 1914 Bombay 237

HEATON AND SHAH, JJ.

Emperor—Prosecutor.

v.

Nanji Samal—Accused.

Criminal Ref. No. 61 of 1913, Decided on 28th August 1913, made by Sess. Judge, Ahmedabad.

Criminal P.C. (1898), S. 213—Case triable by Magistrate committed to Sessions—Reasons for commitment must include reasons for not discharging accused and also for

sending him to Sessions—Not giving reasons is not mere irregularity but illegality.

Where a case is triable by a Magistrate or by a Court of Session, and is committed to the Sessions, the reasons for commitment should include not merely reasons for not discharging the accused but reasons for sending him before the Court of Session, and where the case is not one which ought to have been committed, then to commit without giving reasons is more than an irregularity, it is an illegality on account of which the commitment must be quashed. [P 238 C 1]

G. N. Thakore—for Accused.

Judgment.—In this case, the Magistrate, as appears quite plainly from Cl. 2, S. 83, Registration Act, could have tried the case himself, but he committed it to the Court of Session. He did not however give any reason why he should commit it rather than try it himself. The law requires that reasons for commitment shall be recorded: see S. 213. Criminal P. C.. In a case of this kind, where the trial may either be by the Magistrate himself or by the Court of Session, I think that reasons for commitment must include not merely reasons for not discharging the accused, but reasons for sending him before the Court of Session. There has therefore been a failure to comply with the law. This, no doubt, would amount to no more than an irregularity if the case were one which plainly ought to be committed to the Sessions. But where, as appears here, the case is not one which ought to have been committed, then to commit without giving reasons is more than an irregularity. It is, it seems to me, an illegality.

For this reason I would quash the commitment, and it follows the case will have to be disposed of by the Magistrate who committed it.

G.P./R.K. Commitment quashed.

A. I. R. 1914 Bombay 238

SCOTT, C. J., AND DAVAR, J.

Madhavrao Moreswar Pant—Appellant.

v.

Rama Kalu Ghadi—Respondent.

Second Appeal No. 798 of 1913, Decided on 26th August 1914, from decision of Addl. First Class Sub-Judge, Ratnagiri, in Appeal No. 134 of 1912.

Provincial Small Cause Courts Act (1887), Sch. 2, Art. 13—Suit to recover sums payable by Khatedar to inamdar in respect of immovable property is not cognizable by Court of Small Causes.—In such suit set-off cannot be given for stipends payable by

inamdar to pujairis of which defendant was one—Civil P. C. (1902), O. 8, R. 6.

A suit for the recovery by an inamdar of sums payable by khatedar in respect of certain immovable property held by him under the inamdar as his superior holder, is not cognizable by a Court of Small Causes. In such a suit the claim of the defendant to set off the stipend payable by the plaintiff to certain pujaris of a temple of whom the defendant was one could not be allowed as he was claiming in a different capacity, in a different category to that in which he held as tenant or khatedar of the plaintiff. [P 238 C-2, P 239 C 1]

G. S. Rao, and S. Y. Abhyankar—for Appellant.

A. G. Desai—for Respondent.

Judgment.—This is a suit for the recovery by an inamdar of sums payable by a khatedar in respect of certain immovable property held by him under the inamdar as his superior holder. It is contended that being for an amount less than Rs. 500, and cognizable by a Court of Small Causes, no second appeal will lie. The question is whether it is cognizable by a Court of Small Causes. We have been referred, on the part of the appellant, to Art. 13, Sch. 2, Provincial Small Cause Courts Act 9 of 1887, which excepts from the cognizance of a Court of Small Causes a suit to enforce payment of dues when the dues are payable to a person by reason of his interest in immovable property. Now the sums payable by an inferior holder to a superior holder in the Bombay Presidency are in another Act of the Imperial Legislature characterized as dues: see Revenue Jurisdiction Act 10 of 1876, S. 5, Cl. (c). The moneys claimed therefore in this suit may appropriately be described as dues payable to the plaintiff by reason of his interest in immovable property, held by the defendant, and therefore Art. 13 of the Schedule of the Small Cause Courts Act applies, and this was a suit not cognizable by a Court of Small Causes. We therefore overrule the preliminary objection.

The defendant does not contest the right of the plaintiff to payment of his dues as superior holder, but claims to be entitled to set off the stipend, payable by the plaintiff to certain pujaris of a temple, of whom defendant was one. That stipend was payable to the defendant and his bhaubands. He therefore claims a set-off in a different capacity in a different category to that in which he holds as tenant or khatedar

of the plaintiff, and he cannot have the set-off, having regard to the provisions of O. 8, R. 6. We therefore set aside the decree of the lower appellate Court which allowed the set-off claimed by the defendant. The plaintiff is entitled to Rs. 41 4-10 (Rs. 39-6-8, the amount of his claim, plus Rs. 1-14-2, the amount of costs incurred in the revenue Court), with further interest upon Rs. 41-4-10. We do not think that he is entitled to his costs because this suit appears to us to have been unnecessarily filed having regard to the fact that he had already obtained decree in assistance suits.

No order as to costs throughout.

G.P./R.K.

Decree set aside.

A. I. R. 1914 Bombay 239

MACLEOD, J.

Bansidhar Lachhminarayan and others—Plaintiffs.

v.

Jwalaprasad Gayaprasad and others—Defendants.

Original Civil Suit No. 1219 of 1912,
Decided on 27th February 1914.

(a) **Hundi**—Custom among shroffs relating to shahjog hundi stated.

According to the custom among shroffs relating to shahjog hundis the shah who obtains payment of a shahjog hundi is, in the event of the hundi turning out to be a false, fraudulent, stolen or forged one, bound to refund the amount of the hundi with interest unless he produces the actual drawer or the person who committed the fraud. [P 240 C 2]

(b) **Hundi**—Practice among shroffs dealing with hundi—Shah guaranteeing genuineness of hundi and not solvency of drawer—Drawee will not pay on presentation of shahjog hundi unless he is satisfied as to respectability of shah.

According to the actual practice of shroffs when dealing with hundis, whether shahjog or not, the shah does not guarantee the solvency of the drawer but guarantees the genuineness of the hundi. A drawee will not pay a hundi unless he has funds in his hands belonging to the drawer, or is willing to give him credit, and he will not pay on presentation of a shahjog hundi to a shah, unless he is satisfied as to the respectability of the shah as he looks to him in case of anything afterwards going wrong with the hundi. The respectability of the shah is matter only for the drawee to consider. [P 240 C 2]

(c) **Hundi**—Person sending hundi for collection is not one from whom hundi is bought.

The person who sends a hundi for collection is not the person from whom the hundi is bought. [P 241 C 1]

(d) **Hundi**—Claim for refund against shah must be made directly without delay—Delay

over month disentitles claimant from recovering.

The claim to a refund against a shah who has received payment of a hundi on the ground that the hundi is a forgery, must be made as soon as possible after the forgery has been discovered so as to enable the shah to protect himself. Delay in making the claim over a month without any reasonable excuse will disentitle the claimant from recovering. The fact that the police in their investigation regarding the forgery visited the shop of the shah cannot be considered as a communication by the claimant to the shah of the forgery, and certainly cannot be taken for a claim to a refund. [P 242 C 1]

(e) **Practice**—Notices regarding mercantile documents should be clear precise and direct.

It is necessary that all notices involving responsibility on mercantile documents should be clearly, precisely and directly given. [P 242 C 1]

Strangman, Inverarity and Setalvad—for Plaintiffs.

Raikes and Kanga—for Defendant 1.

Judgment.—The plaintiffs seek to recover from the defendants the sum of Rs. 3,000 with interest from 10th June 1912 under the following circumstances:

On 10th June defendant 1 received from defendant 2 a hundi for Rs. 3,000 purporting to be drawn by one Ramlal Ramprasad in favour of defendant 2 on the plaintiffs payable at sight to a shah.

The hundi is Ex. C. Over a one anna stamp at the top is written: "Hundi is sent for collection by Manilal Gayaprasad (defendant 2) to Bhai Jwala prasad Gayaprasad (defendant 1)." There had been dealings to a considerable extent between defendants 1 and 2. The hundi was presented the same day to the plaintiff but, as they had received no advice regarding it payment was refused.

On 11th June the plaintiffs received a letter, Ex. A, purporting to be written from Harpalpur by one Ramlal Ramprasad enclosing a railway receipt for 300 bags of linseed which was to be sold at a profit. Notice was given that two hundis for Rs. 3,000 each had been drawn in favour of Manilal Gayaprasad on the plaintiffs payable at sight which, plaintiffs were requested to accept and pay. The following address was given:

"Ramlal Ramprasad of Jhansi,
C/o Manilal Gayaprasad
Harpalpur."

The railway receipt is Ex. B written on a form used by the Great Indian Peninsula Railway Company marked

A. G. 6513. It purports to be a receipt by the Station Master at Ranipur Road for 300 bags of linseed consigned by Ramlal Ramprasad to the plaintiffs in Bombay, and is numbered 64 out of book 1166.

The plaintiffs on 11th June handed over this receipt in performance of a contract to one Killachand Devchand, receiving Rs. 5,600.

Thereupon they paid Rs. 3,000 with one day's interest to defendant 1 who endorsed the hundi as paid.

Killachand was unable to obtain delivery of the goods from the railway company and returned the railway receipt to the plaintiffs on 6th August when he got back his money.

Meanwhile the company instituted an inquiry regarding the railway receipt which was suspected of having been forged.

On 4th August, Kashinath, senior clerk in the office of the Goods Superintendent, Wari Bunder, started for Govna as it had been ascertained that a book numbered 1166 had been issued to that station. On 7th August he was at Jhansi where he was joined by Purshotam Raghowji, the plaintiff's gomasta. On 10th August they were at Ranipur and went on the same day to Harpalpur. The result of this inquiry was as follows :

The railway receipt for the 300 bags linseed had never been issued from Ranipur. The form had been stolen apparently out of a book numbered 1166 which had been dispatched with a lot of other unused books of forms from Atara to Jhansi, and the details entered in it forged. The person suspected was Kamlaprasad, the Station Master at Harpalpur. His father's name was Manilal and he had a son called Gayaprasad ; so that there was some reason for suspecting that defendant 2's firm of Manilal Gayaprasad which had a pehdi at Harpalpur was owned by Kamlaprasad. No person of the name of Ramlal Ramprasad could be discovered at Harpalpur, Jhansi or any of the neighbouring towns.

Soon after Kamlaprasad into Harpalpur territory, and it seems most probable that he was the author of the fraud practised on the plaintiffs and defendant 1. The plaintiffs were unable to

serve the summons on defendant 2, so they were struck out.

The plaintiffs contend that according to the well-established custom among shroffs relating to shahjog hundis the shah who obtains payment of a shahjog hundi is, in the event of the hundi turning out to be a false, fraudulent, stolen or forged hundi bound to refund the amount of the hundi, with interest unless he produces the actual drawer or the person who committed the fraud.

The plaintiffs have proved, so far as proof is possible in this case, that there was no such person as Ramlal Ramprasad of Jhansi and that this hundi was therefore a forgery. If the custom set up is binding on the parties the plaintiffs were entitled to call upon defendant 1 to produce Ramlal or refund the Rs. 3,000 with interest.

But the first issue raised by defendant 1 must be disposed of before this question can be discussed, namely whether the hundi as such was paid on the responsibility of defendant 1 as a shah and in accordance with the custom alleged.

I think this issue was raised owing to a misunderstanding regarding the actual practice of shroffs dealing with hundis whether shahjog or not. The shah does not guarantee the solvency of the drawer; he guarantees the genuineness of the hundi. A drawee will not pay a hundi unless he has funds in his hands belonging to the drawer or is willing to give him credit, and he will not pay on presentation of a shahjog hundi to a shah unless he is satisfied as to the respectability of the shah as he looks to him in case of anything afterwards going wrong with the hundi: see remarks of Arnould, J., in *Davlatram Shriram v. Bulakidas Khemchand* (1). Therefore this issue is somewhat meaningless. The respectability of the shah is a matter only for the drawee to consider, as it is difficult to conceive that a shah would repudiate his liability to refund on the ground that he was not a respectable person.

The custom set up by the plaintiffs was held to be proved by Arnould, J., in *Davlatram's* case (1). The head-note runs as follows:

"According to mercantile usage amongst Hindus, where a hundi, drawn payable to

(1) [1869] 6 B. H. C. R. (O. C. J.) 24 at p. 29

holder, shahjogi, is paid at maturity by the drawee to the Shah, or holder of the hundi and such hundi afterwards turns out to be forged, the Shah though a bona fide holder for value, is bound to repay to the drawee the amount of such hundi with interest from the date of payment provided the drawee has been guilty of no laches in discovering the forgery and communicating the fact of such forgery to the Shah.

The Shah however relieves himself from such liability by producing the actual forger.

So far as I know this custom has never since been disputed. It was referred to with approval as well established by Bayley, Acting C.J. and Farran, J., on a reference from the Small Cause Court in *Ganesdas Ramnarayan v. Lachminarayan* (2), and therefore I was of opinion that there was no necessity for the plaintiffs to call evidence to prove that the custom was still followed by shroffs, though defendant 1 was at liberty to call evidence to show that the custom was either no longer followed or had been altered by later usage. I find that this was the view taken by the Small Cause Court in the above case where an attempt was made without success by the defendants to prove that the custom has been altered: see *Ganesdas'* case (2).

The plaintiffs however did prove that both the Marwari Panch Shroff Association and the Marwari Association, which number amongst their members most of the Marwari Shroffs in Bombay, have a rule to the effect that in the case of fraud the payee of a hundi who has received the amount as shahjog shall produce the drawer, and if he does not do so shall pay to the person from whom the amount of the hundi has been received, with interest from the date the money was paid.

It was contended for defendant 1 that the Shah was duly bound to produce the person who sent the hundi, not the drawer; but apart from the finding in *Davlatram Shriram v. Bulakidas Khemchand* (1) to the effect that the Shah could only relieve himself from responsibility by producing the actual forger, the evidence of defendant 1's witnesses, Parbhudayal Hurkissonlal and Pratab Rai Ranchidas, conclusively showed

(2) [1894] 16 Bom. 570.

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that the words "manjal pohochana" in R. 16 meant "trace the hundi to the drawer."

The rule had not been officially translated, but I was informed by the interpreter that the dictionary meaning of the words is, "arrive at the last stage."

It was suggested that these witnesses, after having told defendant 1's solicitors that they would give evidence to the effect that the words meant "trace out the person who sent the hundi," had been got at by the plaintiffs; but whatever promises they may have made before they were called, I was satisfied that they gave to those words the interpretation which they thought was commonly accepted by the members of the two associations.

Arnould, J., in *Davlatram Shriram v. Bulakidas Khemchand* (1) at p. 38 said: "The substantial requisite in case of a forged hundi is that the drawer of the forged hundi, or the person of whom the forged hundi has been bought, should be pointed out." For this he relied on the evidence of the munim of Shivalal Motilal that "the Shah must point out the responsible person."

But at p. 30 he referred to the evidence of the same munim: "The Shah, or the person to whom the money has been paid, must point out the responsible person (the drawer), and, if he do not, he is responsible himself."

Therefore it is not quite clear how the learned Judge arrived at the conclusion that "the responsible person" was either the drawer, or the person from whom the hundi was bought.

In any event the person who sends a hundi for collection is not the person from whom the hundi is bought.

But the evidence in this case is conclusive that it is the duty of the Shah in the case of a forged hundi to produce the drawer or refund the money. Even if the custom were as alleged by defendant 1, it cannot be said that they ever made the slightest attempt to produce Manilal Gayaprasad.

But, as stated by Arnould, J., at p. 31, "if the discovery or communication to the Shah of the fact of the forgery is delayed by the laches or negligence of the drawee, he can, in such case, claim a refund from the Shah."

It is contended by defendant 1 that the plaintiffs have been guilty of laches. Now it is clear that Purshotam Raghawji, the plaintiff's gumsta must have ascertained by the 10th or 11th August that the hundi was a forgery and yet no demand was made upon defendant 1 until 25th September. This was due to the absence of the plaintiff from Bombay from 9th July until 23rd September. He said he returned to Bombay in consequence of information. He was not asked when he received information; but in any event he ought to have been informed immediately by Raghawji that Ramlal could not be traced, and if Raghawji delayed in informing his master, his master must be held responsible for the consequences.

In my opinion the claim to a refund against a Shah who has received payment of a hundi, on the ground that the hundi was a forgery, must be made as soon as possible after the forgery has been discovered, so as to enable the Shah to protect himself, and the plaintiff in this case was guilty of such delay, namely, over a month, without any reasonable excuses as to disentitle him from recovering. It was suggested that defendant 1 had notice in August that the police were making inquiries as the Sub-Inspector visited their shop; but I do not think that that can be considered as a communication by the plaintiff to defendant 1 of the forgery, and there certainly was no claim to a refund. It is necessary that all notices involving responsibility on mercantile documents should be clearly, precisely and directly given.

The suit must be dismissed but without costs.

G.P./R.K.

Suit dismissed.

A. I. R. 1914 Bombay 242

BEAMAN AND HEATON, JJ.

Nathabhai Tricamlal—Plaintiff—Applicant.

v.

Ranchodlal Ramji and another—Defendants—Respondents.

Civil Revn. Appln. No. 199 of 1914, Decided on 18th August 1914, from decision of Small Cause Court, Judge, Ahmedabad, in Suit No. 3190 of 1913.

(a) Civil P. C. (1908), O. 9, R. 5—Suit against several defendants—Name of one

struck off with plaintiff's consent—Striking out name owing to difficulty in serving him is procedure under R. 5 rather than under Civil P. C., O. 23, R. 1.

Where in a suit against several defendants, there is some difficulty in serving one of them and hence his name is struck off, if not at the request, at least with the consent of the plaintiff, the striking out of the name, even before a year has elapsed, would be a procedure under O. 9, R. 5, rather than O. 23, R. 1.

[P 242 C 2]

(b) Contract Act (1872), Ss. 134, and 137—Suit against principal debtor and surety—Omission to pursue suit against former—Surety is not discharged by dismissal of suit under Civil P. C. (1908), O. 9, R. 5.

In a suit against the principal debtor and surety, the mere omission of the plaintiff to pursue his suit against the principal debtor with the result that his name is struck off and the suit dismissed against him under O. 9, R. 5, does not discharge the surety, provided the suit be still in time against the principal.

[242 C 2]

T. R. Desai—for Applicant.

Ratanlal Ranchhodas—for Respondents.

Judgment.—The plaintiff sued the two defendants on a promissory-note. Defendant 2 pleaded that he was a surety. There was some difficulty in serving defendant 1, and we gather from the record that his name was struck out. As a year had not elapsed, presumably this was done, if not at the request, at least with the consent, of the plaintiff. Defendant 2 then contended that as the act of the plaintiff in having defendant 1's name thus struck off operated as a complete discharge of the principal debtor, he, the surety was likewise discharged and the suit must be dismissed.

The learned Judge who tried this suit as a Small Cause Court suit was of opinion that this contention was sound and dismissed the plaintiff's suit.

We think that the striking off of defendant 1's name was a procedure under O. 9, R. 5, rather than O. 23, R. 1. And all the authorities in all the Courts of India who have had this question under consideration, although they differed upon another point, are in agreement that the mere omission of the plaintiff to pursue his suit against one of the defendants with the result that that defendant's name is struck off and the suit dismissed against him under O. 9, R. 5, does not discharge the surety, provided the suit be still in time against the principal. That being so and confining our decision to that

ground alone, we think that the order of the learned Judge below dismissing the suit was wrong.

Even were that not so, it would still be a question whether, in view of the form of the suit, the Judge ought to have taken it for granted, as he appears to have done, that the plaintiff was suing defendant 2 merely as a surety. If, in fact, he was suing him as a principal, none of the considerations upon which the dismissal of the suit has been based would apply at all.

We must, therefore, reverse the decree of the learned Judge below and remand the case to him for trial upon the merits.

Costs will be costs in the cause.

G.P./R.K. *Rule made absolute.*

A. I. R. 1914 Bombay 243

SCOTT, C. J., AND BEAMAN, J.

Mulia Bhana — Defendant — Appellant.

v.

Sundar Dana — Plaintiff — Respondent.

Second Appeal No. 96 of 1913, Decided on 3rd June 1913, from decision of Dist. Judge, Ahmedabad, in Appeal Nos. 260 and 284 of 1911.

(a) Easements Act (1882), S. 4—Definition of easement applies to eaves used for discharge of rain-water irrespective of whether country is dry or has abundant rainfall.

The definition of "easement" in the Easements Act applies just as much to a projection of eaves in the dry country where there is no discharge of rain-water as in a country where there is an abundant rainfall and eaves must be used in the ordinary course for the discharge of rain-water. [P 243 C 2]

(b) Easements Act (1882), S. 23—Easement from projection of eaves at particular height—Height can be raised if burden on servient tenement is not increased.

If a person has acquired an easement from a projection of eaves at a particular height over another's land he can raise the height of those eaves so long as he does not throw an increased burden upon a servient tenement. [P 243 C 2]

(c) Easements Act (1882), S. 18 — Agreement not to open windows in wall — Windows opened in continuous back wall in existence at date of agreement — Lower Court's order to close up windows opened cannot be interfered with by High Court.

Where there was a written agreement between the parties in which the defendant undertook not to make any opening in his back wall, and the wall in which he subsequently opened the windows complained of was a continuous back wall with the back wall in existence at the date of the agreement:

Held: that having regard to that agreement the High Court could not interfere with the decision of the lower Court requiring the defendant to close up the windows which he had opened in his back wall. [P 244 C 2]

G. N. Thakore—for Appellant.

G. K. Parekh—for Respondent.

Judgment.—There are two questions on which the parties are at issue in this appeal. The first is whether the defendant, who at a previous time had his eaves projecting ten inches over the plaintiff's land, (and so far as we can judge he had uninterrupted enjoyment of them for 25 years) should be interfered with when he raises the wall of his house and projects the eaves to the same extent at a correspondingly increased height. The learned District Judge has held that, except in the case of the discharge of water from the eaves, the nature of the interference with the right of the servient tenement is trespass and not within the law relating to easements. We are unable to agree with his opinion upon that point. It appears to us that the definition of "easement" in the Easements Act applies just as much to a projection of eaves in a dry country where there is no discharge of rain-water as in a country where there is an abundant rainfall and there is discharge of water. It is to be observed, moreover, that in Ahmedabad, there is often an abundant rainfall, and the eaves must be used in the ordinary course for the discharge of rain-water. The case falls within the decision of this Court in *Chhotalal Hirachand v. Manilal Gagalbhai* (1).

If the defendant has acquired an easement from a projection of eaves ten inches over the plaintiff's land, he can raise the height of those eaves so long as he does not throw an increased burden upon the servient tenement. That is provided by S. 23, Easements Act: see also *Harvey v. Walters* (2).

We understand the learned District Judge's finding, that the defendant has projected his eaves beyond their former limit, to be based upon his proposition of law that the defendant cannot project his eaves at all at a different height to that at which they were originally projected. The decree therefore must be modified in respect of the eaves.

(1) [1913] 37 Bom. 491=20 I. C. 246.

(2) [1873] 8 C. P. 162=42 L. J. C. P. 105=28 L. T. 343.

The second point is based upon a customary easement which is alleged to be in force throughout Gujarat. Customary easements are recognized under the Easements Act, S. 18. It was stated in *Manishankar Hurgovan v. Trikam Narsi* (3) that "a series of decisions, extending over a long number of years, has settled the question, that, in accordance with the usage of Gujarat, a man may not open new doors and windows in his house, or make any new apertures, or enlarge old ones, in a way which shall enable him to overlook those portions of his neighbour's premises which are ordinarily secluded from observation, and in this manner to intrude upon that neighbour's privacy; and that an invasion of privacy is an infraction of a right, for which the person injured has a remedy at law." The decisions which are quoted in support of that proposition do not entirely bear it out. For example, one of the cases quoted is *Syed Imambuksh v. Guggul Purbhoodas* (4), decided in 1862, where the plaintiff sued to cause an eyelet made in the backwall of the defendant's house to be blocked up as destroying the privacy of his premises. The defendant pleaded that the opening was not recent and that the plaintiff did not suffer any inconvenience from it. It was alleged by the plaintiff that the opening could be used in order to look into his privy. The learned Assistant Judge however did not consider that the plaintiff suffered any material inconvenience from his yard being commanded by the eyelet, and the Sardar Diwani Adawlut, accepting the finding of the Assistant Judge, confirmed his decree with costs. That is the most recent case to be found in the reports prior to the decision of *Manishankar Hurgovan v. Trikam Narsi* (3). Then in *Keshav Harkha v. Ganpat Hirchand* (5), in a second appeal, Melvill and Kemball, JJ., after referring to the dictum in *Manishankar Hurgovan v. Trikam Narsi* (3), said: "We are certainly not disposed to extend the privilege further than it was carried in that case; and as it appears from the Assistant Judge's judgment in the present case that the window opened by the de-

fendant looks, not into the plaintiff's private apartments, but into an open courtyard outside his house, we are of opinion that there has been no invasion of the plaintiff's privacy which will entitle him to have the window closed." Here the finding of the lower Court is that "the jalis and windows in the back wall of the defendant's house command a khadki or courtyard which is a place which can be used for females to bathe and similar purposes of privacy, and the defendant admits from his present window people sleeping in the plaintiff's house can be seen, and the jalis are, no doubt, above a man's height; but if one were inclined to peep through the same, he can peep straight into the plaintiff's house, the male apartment next to the osari. Even if he were to peep into the khadki of the plaintiff's house, the privacy of his people and that of his tenants would be disturbed." If the case rested there we should hesitate to hold that the plaintiff was upon these findings entitled to relief having regard to the decision of *Syed Imambuksh v. Guggul Parbhoo-das* (4) and in *Keshav Harkha v. Ganpat Hirchand* (5). But there was an agreement between the parties reduced to writing in April 1879, in which it was agreed by the defendant's father that he would not make any opening in his back wall. The wall in which these jalis and windows, which are complained of, are opened is a continuous back-wall with the back wall in existence at the date of the agreement of 1879. Having regard to that agreement we cannot interfere with the decision of the lower Courts requiring the defendant to close up the jalis and windows which he has opened in his back wall.

We therefore vary the decree of the District Judge by deleting the injunction against the construction of the eaves of the new roof so as to project over the land of the plaintiff. It must be understood that this variance of the District Judge's decree in no way authorizes the defendant to project his eaves more than ten inches over the plaintiff's property. Plaintiff must have the costs which are incidental to the institution of the suit. As to all other costs each party must bear his own.

G.P./R.K.

Decree varied.

(3) [1868-69] 5 B. H. C. R. (A. C. J.) 42.

(4) [1862] 9 Harrington 274.

(5) [1871] 8 B. H. C. R. (A. C. J.) 87.

A. I. R. 1914 Bombay 245 (1)

SCOTT, C. J., AND HAYWARD, J.

Sitaram Morappa Nawale—Defendant—Appellant.

v.

Shri Khandota — Plaintiff—Respondent.

Second Appeal No. 10 of 1914, Decided on 4th September 1914, against decree of Sub-Judge, Karad, in Suit No. 1883 of 1910.

Dekkhan Agriculturists' Relief Act (17 of 1879) Ss. 3 (w) and 53—Suit under S. 3 (w)—Revision cannot be entertained by First Class Sub-Judge though it can be done by District Judge under S. 53.

Against the decision of a first Court in a suit falling under S. 3 (w) a First Class Subordinate Judge cannot entertain a revision though a District Judge can do so, under S. 53 of the Act. [P 245 C 1]

M. V. Bhat—for Appellant.*J. R. Gharpure*—for Respondent.

Judgment.—This was a suit falling under S. 3 (w) *Dekkhan Agriculturists' Relief Act*. That being so, according to the provisions of S. 10, no appeal lay from the decision of the first Court. The appeal however has been entertained and disposed of by Mr. Rahurkar, the First Class Subordinate Judge. We think it is clear, having regard to the terms of S. 53, that the First Class Subordinate Judge was not authorized to pass any decree or order in a matter which could be entertained under S. 53, and if it were necessary to pass any order in revision, such order should have been passed by the District Judge. The most we can do here is to set aside the decree of the First Class Subordinate Judge and remit the application of the appellant from the decision of the first Court to the District Judge, who may, if he thinks fit, treat it as an application in revision under S. 53, and pass such order as he thinks necessary under the circumstances. Costs to be dealt with by the District Judge.

G.P./R K.

*Decree set aside ;
Application remitted.*

A. I. R. 1914 Bombay 245 (2)

BEAMAN AND HAYWARD, JJ.

Bhagwat Bhaskar Koranne—Plaintiff—Appellant.

v.

Nivritti Sakharam Bhadule—Defendant—Respondent.

Second Appeal No. 504 of 1913, Decided on 20th August 1914, from decision of First Class Sub-Judge, Sholapur, in Appeal No. 78 of 1910.

(a) *Hindu Law—Alienation—Agreement by vendee on certain conditions to reconvey within certain time property purchased—Conditions not fulfilled—Vendee dying—His son denying reconveyance—Widow of vendee held not bound to fulfil agreement and that alienation by her was not justifiable.*

In 1869 A sold his property to R, who passed a contemporaneous agreement to reconvey it to the vendor, if the latter paid him Rs. 100 every year for six years. So matters stood till after the death of R. In 1883 his son D was sued by the representatives of A. The suit took the form of a redemption suit, and he, in his written statement, denied that the agreement had been complied with, or could now be enforced, and at the same time alleged that the transaction was not a mortgage. The defence succeeded and the suit was dismissed. In 1894 after the death of D his mother, who was in life enjoyment of the estate, was again sued for redemption. The suit again failed as barred by the rule of *res judicata*. Shortly after this the widow sold the property to the representatives of A.

Held: (1) that the widow was under no pious obligation to do for the last male holder of the estate what he had emphatically declined to do for himself ;

(2) that the alienation was not justifiable and ought not to be sustained against the reversioners. [P 246 C 2]

(b) *Hindu Law—Alienation—To justify alienation by widow legal necessity is necessary.*

The solid ground upon which alienations by a widow are justified and made good against reversioners is legal necessity. [P 247 C 1]

P. B. Shingne—for Appellant.*D. A. Tuljapurkar*—for Respondent.

Judgment.—The material facts are that in 1869 Appa the original owner of this property, sold it to Ramchandra and Ramchandra passed a contemporaneous agreement, Ex. 87 in the case, under which he agreed that, if the vendor Appa paid him Rs. 100 every year for six years, he would re-convey the land. So matters stood till after the death of Ramchandra. His son Dattatraya was sued in 1883 by the representatives in interest of the original owner Appa. The suit took the form of a redemption suit, because had it been upon the agreement, merely as an

agreement, it is obvious that it would have been time barred. Dattatraya resisted this suit. His written statement shows that he denied that the agreement had been complied with or could now be enforced, and at the same time alleged that the transaction was not a mortgage. The defence succeeded and the suit was dismissed.

In 1894, after the death of Dattatraya, Jankibai, who, as widow of Ramchandra and mother of the last male holder Dattatraya, was in life enjoyment of the estate, was again sued by the representatives-in-interest of Appa for the redemption of this mortgage. The suit again failed on the very obvious ground that the claim was res judicata.

Immediately after this the widow Jankibai appears to have entered into what is called a compromise before the conciliator, and allowed a consent decree against herself for the sale of this land to the representatives of Appa for the sum of Rs. 650. It is this transaction which the plaintiff, who is the reversioner of Dattatraya's estate, seeks to have set aside.

The learned Judge of first appeal, relying upon a current of authority, the effect of which simply is that a Hindu widow is under a pious obligation to pay her deceased husband's debts even though they may be time barred, held, by what we suppose he meant to be a parity of reasoning, that the widow Jankibai here was under the pious obligation to do for the last holder of the estate what he had emphatically declined to do for himself. Now, none of the authorities cited by the learned Judge in support of his proposition has the least bearing upon the facts we have to deal with; nor is there any true analogy between the principle underlying those cases and any principle which could be applied here. Put upon purely ethical, not legal, ground the reasoning of those cases is clear. The Courts have held that a widow is entitled to sell part of the ancestral immovable property to discharge the just debts of her husband even though those debts might be time barred, and this is based doubtless upon the moral duty of discharging the debts to her husband; and again on the assumption that had the husband lived he would, as a moral and

upright man, have discharged them himself. In not one of those cases is to be found the slightest indication that the deceased husband had ever repudiated the debts before his death which the widow paid after his death.

The case here is therefore totally different upon moral principles as well as upon its own facts. There is no question of any debt here at all; nor could it be seriously contended that in acting as she did the widow was doing what the last male holder would have done had he been alive, nor can we say that there was the least moral obligation upon the widow to restore this property to the representatives-in-interest of Appa upon payment of the sum for which it had been sold in the year 1869. That, as soon as the terms of the agreement were exhausted, has been held by the Courts to have been an out and out sale. That was the view which Dattatraya himself took of the transaction when he successfully resisted the attempt of the representatives-in-interest of Appa to redeem the property; and if that were so we are unable to see that the bargain was originally an unfair one or that the last male holder Dattatraya was acting in any way dishonestly in insisting upon adhering strictly to the conditions of the original bargain. So that we are unable to find here the slightest ground for applying the principle upon which alone the learned Judge below appears to have thought that this alienation by the widow was justifiable and ought to be sustained against the reversioner.

It has never been contended that there was any legal necessity for this sale in the ordinary sense of those words; and but for a general expression used in the case of *Chimnaji Govind Godbole v. Dinkar Dhondev Godbole* (1) that a widow may deal with the property finally, provided that she is dealing fairly by the expectant heirs, we do not think that the learned Judge would have been misled into the line of reasoning which he has finally adopted. A general expression of that kind can hardly take the place of the settled principles upon which the law governing this class of cases has long been established. Such terms as "dealing fairly by the expectant reversioners"

(1) [1887] 11 Bom. 320.

are much too loose and general in our opinion to be made the ground of law governing the widow's powers of disposition, during her lifetime, of ancestral immovable property. The only solid ground upon which such alienations are justified and made good against reversioners will be found on analysis in every case to be what is known as legal necessity. Here there is nothing in the least like legal necessity. We are, therefore, forced to the conclusion that the learned Judge below who has, we think, written a very able and careful judgment, has nevertheless entirely misconceived the law and has therefore misapplied it to the facts of the case before him.

We must therefore reverse his decision on issue 1 and remand the case to the learned Judge below to dispose it of upon the remaining points awaiting his decision in the light of the foregoing remarks. In doing so we must observe that the case of defendant 6 has not been dealt with in the Court of first appeal. The learned Judge should inquire into and decide upon the alleged legal necessity of the mortgage under which defendant 6 claims to hold the property from the widow Jankibai. Costs will abide the final result.

G.P./R.K.

Decree reversed.

A. I. R. 1914 Bombay 247

BEAMAN AND HEATON, JJ.

Laxmiram Lallubai Joshi—Plaintiff
—Appellant.

v.

Bhalshankar Veniram Mehta—Defendant—Respondent.

Second Appeal No. 929 of 1913, Decided on 7th July 1914, against Dist. Judge, Ahmedabad in Appeal No. 68 of 1912.

Limitation Act (9 of 1908), Art. 182—Judgment-debtor declared insolvent—Appeal by decree-holder against order is application to take step-in-aid of execution within Art. 182.

An appeal by the decree holder against an order declaring the judgment-debtor an insolvent is "an application to take a step-in-aid of execution" within the meaning of Art. 182, and therefore an application for the execution filed within three years of such an appeal is not barred. [P 248 C 1]

H. V. Divatia—for Appellant.

Manubhai Nanabhai—for Respondent.

Judgment.—The facts in this case are somewhat unusual. There was an ordinary mortgage decree of the year 1903. The mortgagee applied for execution in due course on 8th August 1905. In January 1906 the mortgagor applied under the old Civil Procedure Code to be declared an insolvent. In his application of August 1905 the mortgagee asked that the property might be sold, but did not seek any further relief against the mortgagor. Accordingly in June 1906 the property was sold under this darkhast. In September of the same year the Court declared the mortgagor an insolvent, although under S. 351 it did not discharge him. In December of the same year the Court struck off the darkhast of 8th August 1905 for two reasons: (1) that it had been satisfied; (2) that the judgment-debtor was now an adjudicated insolvent. The mortgagee appeared from the first in the insolvency proceedings as the sole opposing creditor.

We might find some difficulty, more, speaking for myself I think, a verbal than a real difficulty, in bringing such appearance within the meaning of the words "application to take some step-in-aid of execution" under Art. 179 (old), now Art. 182. But as the result of those proceedings was against him, the creditor, appellant here, appealed to the District Court and succeeded. We think that it is not putting too great a strain upon ordinary language to say that an appeal in such circumstances fairly falls within the meaning of the words "an application to take a step-in-aid of execution." It is clear that as long as the insolvency proceedings went in favour of the debtor, the creditor could not have presented any application in the ordinary course for the further execution of his decree with the least hope of success. Two at least of the High Courts in India had already put so liberal a construction upon the insolvency provisions of the old Civil Procedure Code that an executing creditor must have foreseen that no application for the execution of the decree, either by sale of property or arrest of the person of the judgment-debtor, could have the least chance of success so long as the judgment-debtor had been declared an insolvent, under S. 351, even although he had not been actually dis-

charged within the meaning of S. 357. So that we think that in view of the Court's finding that this judgment-debtor was an insolvent early in 1906 the present appellant had no other course open to him than in the first instance to get this bar to the further execution of his decree removed, and the only way in which he could hope to obtain that result would be by first opposing the insolvency petition in the first Court, and, if he failed there, by appealing to higher authority. This he did, and although it is unnecessary to trace the subsequent tedious proceedings, it is sufficient to say that his last appeal could not have been made earlier than January 1909, that is to say, well within three years of his present darkhast.

Adopting that view it is unnecessary to enter into any of the other nice and difficult questions which have been raised and adequately argued in the course of this appeal. We do not seek to lay down any general principle upon any of those questions, but we desire to confine our judgment to the rather unusual facts before us, and we think that we do no violence to the meaning of Art. 179 (old), now Art. 182, by holding that the present darkhast is within three years of the last application made by the judgment-creditor to a Court to take some step-in-aid of the execution of his decree. For these reasons we think that the appeal ought to be allowed and the judgment of the Court below reversed. We direct therefore that the darkhast be restored and that execution do proceed upon it according to law. We think that this appeal must be allowed with all costs.

G.P./R.K.

*Appeal allowed.***A. I. R. 1914 Bombay 248****BEAMAN AND HAYWARD, JJ.***Shridhar Balkrishna Vaidya*—Plaintiff—Appellant.

v.

Babaji Mula Agarya — Defendant — Respondent.

Second Appeal No. 706 of 1913, Decided on 2nd July 1914, from decision of 1st Cl. Sub-Judge, Ratnagiri, in Appeal No. 401 of 1912.

(a) **Bombay Khoti Settlement Act (1860), Ss. 7 and 10**—Defendant resigning occupancy rights in khoti to plaintiff (one of khots) for consideration—Simultaneous ex-

ecution of lease for five years—Defendants attorning to plaintiff respecting these lands—Plaintiff suing to recover possession after expiry of term—Consent of khot held necessary for resignation to be valid transfer under S. 9 and that resignation with consideration held not valid.

The defendant purported to resign his occupancy rights in a khoti to the plaintiff (one of the khots) for consideration and synchronously with the resignation a lease for a term of five years was executed, the defendant attorning to the plaintiff in respect of these lands. On a suit by the plaintiff to recover possession after the expiry of the terms

Held: (1) that the alleged resignation must be regarded as transfer which could only be legal under S. 9 provided that the consent of the khot was obtained;

(2) that the transaction could not be regarded as a resignation under S. 10 since it was accompanied with consideration;

(3) that as both parties were in pari delicto, the plaintiff was not entitled to estop the defendant from showing the illegality of the title so founded. [P 249 C 1]

(b) **Evidence Act (1872), S. 116—Legislature.**

There is no estoppel against an Act of Legislature. [P 248 C 2]

D. A. Khare and P. D. Bhide—for Appellant.

V. R. Virkar—for Respondent.

Judgment.—In this suit the defendant purported to resign his occupancy rights in a khoti to the plaintiff, who was one of the khots in the year 1905. Synchronously with this resignation a lease for a term of five years was executed, and the defendant attorned to the plaintiff in respect of these lands. It is found as a fact that the proposed resignation was accompanied by consideration. After the expiration of the term the plaintiff has sued the defendant upon the lease, and the question of greatest difficulty which has arisen in the appeal is whether the defendant is entitled to impugn the plaintiff's title.

We pass over the nice point whether the estoppel mentioned in S. 116, Evidence Act, survives the term upon which the lands may have been demised. This difficulty would arise upon a construction of the words "during the continuance of the tenancy." We think it unnecessary to give any decision upon that point, because we entertain no doubt but that the defendant is not estopped from challenging the legality of the plaintiff's title. There is no estoppel against an Act of Parliament or in this country against an Act of Legis-

lature. It is to be remembered that the transfer or resignation and the lease were made at the same time and formed parts of what is virtually one transaction. If the transfer is found to be tainted with any illegality as being in contravention of any provision of the statute law, the letting must go with it. We entertain no doubts in the state of the authorities but that this alleged resignation must be now regarded as a transfer. That has already been decided in more than one case in this Court, and must be regarded as settled law. Then if a transfer, it could only be legal under S. 9, Khoti Act, provided that the conditions set forth in that section have been complied with. The essential condition which we have to consider is whether the consent of the khot was obtained, for it is not alleged that this transfer could be validated on the ground of any custom proved, authorizing a tenant so to alienate his occupancy right without the consent of the khot. It is not seriously contended that the consent of the khot, within the full meaning of that term, has been obtained. One khot, the man in whose favour the void resignation was made, has of course consented. It is admitted that there are other khots whose consent would also be necessary, and it is not suggested that that consent has been obtained. In these circumstances there could be no transfer under S. 9. That section expressly makes occupancy rights of this kind non-transferable unless the conditions stated in the section have been complied with; nor, as we said, in the state of authorities could it be regarded as a resignation under S. 10 since it was accompanied by consideration. Therefore the foundation of the plaintiff's title in 1905 is shown to have been illegal. It was moreover a contract between the plaintiff and the defendant here, so that both parties may be said to have been in *pari delicto*, and the plaintiff is not entitled to estop the defendant from showing the illegality of the title so founded. We must therefore confirm the decree of the Court below and dismiss this appeal with all costs upon the appellant.

G.P./R.K.

*Appeal dismissed.***A. I. R. 1914 Bombay 249**

BACHELOR AND SHAH, JJ.

Achut Ramchandra Pai and others—
Plaintiffs—Appellants.

v.

Nagappa Bab Balgaya and others—
Defendants—Respondents.

Second Appeal No. 520 of 1912, Decided on 24th July 1913, from decision of Dist. Judge, Kanara, in Appeal No. 2 of 1912.

(a) Civil P. C. (1908), O. 7, R. 11 (c)—*Appeal memorandum insufficiently stamped should not be rejected without giving further time to make up the deficiency.*

Where a plaintiff or an appellant is within time in the actual presentation of his plaint or memorandum of appeal, though matters cannot be carried further owing to the document being insufficiently stamped, he is entitled to some further time for the payment of court-fees. [P 250 C 1, 2]

(b) Civil P. C. (1908), S. 149—*Concession in S. 149 is not restricted to cases of bona fide misunderstanding of law as to valuation—Court should have free discretion in matter.*

The concession referred to in S. 149, is not restricted to cases where there is a bona fide misunderstanding of the law as to valuation; the inference is that the legislature intended that the Court should have a free and unshackled discretion in this matter.

[P 250 C 2, P 261 C 1]

K. H. Kelkar and G. P. Murdeshwar—
for Appellants.*V. B. Sirur—*for Respondents.

Judgment.—The appellants before us were the plaintiffs in the original suit, and the trial Court made a decree against them. On the last day allowed by the law of limitation, they filed their appeal in the District Court. The memorandum of appeal was, however, insufficiently stamped, and the plaintiffs' pleader, on being questioned as to this replied that he had no funds with which to pay the requisite stamp, and requested that the Court would give him time within which to make the necessary payment. The District Judge refused to grant the time applied for, and rejected the memorandum of appeal.

The question before us is whether that was a right order. There can be no doubt, we think, that if the document presented had been a plaint and not a memorandum of appeal, the learned Judge's order of rejection would have been unsustainable. That appears to follow from the terms of O. 7, R. 11 (c), which provides for the case of the presentation of a plaint written upon paper insufficiently stamped, and the provision

of the law is that such a plaint shall be rejected only if the plaintiff, on being required by the Court to supply the requisite stamp paper within a time to be fixed by the Court, fails to do so. In the case of an insufficiently stamped plaint, therefore, it is clear that, provided the insufficiently stamped paper be presented within the time allowed by the law of limitation, the appellant is entitled as of right to demand from the Court that some further time, to be fixed according to the Court's discretion shall be allowed to him in order that he may make up the deficiency in the stamp. In our opinion, a memorandum of appeal stands on the same footing as a plaint for the present purposes. For S. 107, sub-S. 2 of the Code, which reproduces S. 582 of the old Code, provides that the appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by the Code on Courts of original jurisdiction in respect of suits instituted therein. Moreover, unless the authority to reject such a memorandum of appeal as this referred to O. 7, R. 11 (c), there is not, so far as we are aware, any authority to which such action of the Court could be referred.

Mr. Sirur for the respondents has urged that the rejection of a memorandum of appeal should be attributed not to O. 7, R. 11 (c), but to O. 41, R. 3. It is true that this rule provides for the rejection of a memorandum of appeal in certain cases; but those cases are limited by the preceding rules to cases where the memorandum of appeal is defective in point of form or in respect of the grounds which it must contain, and this rule cannot, we think, be interpreted as covering a case where the memorandum of appeal is rejected by reason of insufficiency of stamp.

There is not, in our opinion, anything repugnant in this interpretation of the law. Admittedly, before the present Code was enacted, there was much divergence of opinion between the High Courts of India upon this and cognate points, and it may well be that in this difference of judicial opinion the legislature thought well to adopt the principle that where the plaintiff or appellant was within time in the actual presentation of his plaint or memorandum of appeal, though matters could not then be

carried further owing to the document being insufficiently stamped, yet the party should be entitled to some further time for the payment of court-fees. It seems hardly necessary to observe that the obligation imposed by the law of limitation and the obligation to pay the requisite fees are matters which stand on a very different basis.

Then it was urged that this view of the law is in conflict with S. 149, Civil P. C. That section, however, is, as we read it, a general provision empowering the Court to extend the time for the payment of fees on any and all documents which may be presented to it. But when a particular document is a plaint or memorandum of appeal, then the Court's discretion must be exercised in accordance with the special provisions of O. 7, R. 11 (c). Thereafter, S. 149 would come into play, and would operate to produce this effect, that upon the payment of the requisite fee within the time allowed by the Court, the document, in respect of which such fee was payable, would have the same force and effect as if such fee had been paid in the first instance. The learned Judge below in considering S. 149 observed that it was intended "solely for the purpose of enabling the Court to deal equitably within any bona fide misconstruction of the law as to valuation." We are of opinion, however, that this is not the correct interpretation of S. 149. First, there are no words in the section to countenance or warrant such a limited construction of it. Then the section, as it stands, is a section which in the new Code was substituted for S. 582-A of the old Code. S. 582-A was apparently enacted with a view to remove what was considered to be the hardship caused by certain decisions of the Allahabad High Court, and that section provided for the validation of insufficiently stamped memoranda of appeals provided that they had been presented within the proper period of limitation and "the insufficiency of the stamp was caused by a mistake on the part of the appellant as to the amount of the requisite stamp." Under S. 582-A, therefore, the discretion of the Court was fettered by this limitation that the insufficiently stamped memorandum of appeal could not be validated unless the Judge was satisfied that the insuffi-

ciency arose from a mistake on the part of the appellant.

Turning now to S. 149 of the present Code, it will be seen that these words of limitation are omitted from it, and the inference appears to be that the legislature by the new provision intended that the Court should have a free and unshackled discretion in this matter. There seems, therefore, to be no ground for the learned Judge's view that the concession referred in S. 149 must be restricted to cases where there was a bona fide misunderstanding of the law as to valuation.

Finally, Mr. Sirur endeavoured to call in aid of his clients Ss. 6, 28 and 30. Court-fees Act, but these sections, in our opinion, have no application to the facts at present before us. For, there is no question in this appeal of receiving, or filing, or exhibiting or acting upon an insufficiently stamped document as if it were sufficiently stamped, but of determining what, if any, opportunity the appellant can claim under the law for removing the objection on the score of the insufficiency of the stamp.

On these grounds, we are of opinion, that the order made by the learned Judge below must be set aside. We accordingly reverse it and remand the appeal to him to be decided in accordance with the foregoing observations and with the provisions of S. 149, and of O. 7, R. 11, (c), after the learned Judge shall have required the appellants to supply the requisite stamp paper within a time to be fixed by the District Court.

The appellants must have the costs of this appeal.

G.P./R.K.

Order reversed.

A. I. R. 1914 Bombay 251

BEAMAN AND HAYWARD, JJ.

Tulsidas Lalubhai—Petitioner—Appellant.

v.

Bharatkhand Cotton Mills Co., Ltd.—Defendants—Respondents.

Civil Misc. Appeal No. 31 of 1913, Decided on 12th August 1914, from decision of District Judge, Ahmedabad, in Miscellaneous Application No. 282 of 1912.

(a) Companies Act (1882), S. 169—Whether dispute regarding debt is genuine or cloak of company's inability to pay debts

after proper demand is all that is considered by Courts while winding up companies.

The principle upon which a company is to be wound up on the petition of a creditor is simply its inability to pay after proper demand made and the lapse of three weeks. Any such neglect must be judged by reference to the facts of each particular case, and when the defence is that the debt is disputed, all that the Court has first to see is whether that dispute is, on the face of it, genuine or merely a cloak of the company's real inability to pay just debts.

[P 252 C 1]

(b) Companies Act (1882), S. 169—Creditor's demand believed to be fraudulent and unsustainable at law—Object of creditor alleged to bring pressure of insolvency proceedings in order to obtain cheap and expeditious payment—Petition for insolvency must be dismissed.

Where a creditor's demand is in respect of a claim which the company honestly believes to be a fraudulent claim and unreasonable at law, and in filing a winding up application, his object is to bring the pressure of insolvency proceedings to bear upon the company in order to make it pay cheaply and expeditiously a heavy debt which it desires to dispute in the civil Courts, the petition for insolvency of the company must be dismissed under S. 169 [P 252 C 1]

(c) Companies Act (1882), S. 169—Appeal.

An appeal will lie from an order refusing to wind up a company. [P 252 C 1]

G. S. Rao and M. K. Mehta—for Appellant.

B. J. Desai and D. A. Khare—for Respondents.

Judgment.—The petitioner-appellant is assignee of certain debts alleged to be due by the defendant company to its late Secretary and Manager, Mr. Kevaldas, and his benamidars, his wife and daughter. The petitioner-appellant gave the company notice on 7th October 1912 and demanded payment. On 24th October 1912 the company replied in a rather vaguely worded letter, the general content of which however clearly indicates the line of defence subsequently adopted by the company. On 15th November the petitioner, instead of accepting the company's challenge and bringing a suit to vindicate the justice of his demand, put in a winding-up petition. This came on before the District Judge, and the company replied in effect that the alleged demand was in respect of a claim which the company honestly believed to be a fraudulent claim and unsustainable at law. The matter appeared to the learned District Judge to be one of great complexity, and we think that in declining to go into it upon this petition he acted upon sound and correct principles. We are not afforded any assistance by such cases.

as *In re King's Cross Industrial Dwellings Co.* (1) and *In re Great Britain Mutual Life Assurance Society* (2). The dicta of Jessel, M. R., in the latter case, certainly appear to be rather widely and loosely expressed, but in no case could such general dicta be carried further than the facts of the case would warrant. If any general rule is to be laid down at all, it is easily obtained from the statute law. The principle upon which a company is to be wound-up, for all the purposes with which we are now concerned, is simply its inability to pay its just debts, and that inability is said to be indicated by its neglect to pay after proper demand made and the lapse of three weeks. It is quite clear however that any such neglect must be judged by reference to the facts of each particular case, and that, where the defence is that the debt is disputed, all that the Court has first to see is whether that dispute is, on the face of it, genuine or merely a cloak of the company's real inability to pay just debts. In this case it is perfectly clear that the defence, whatever its ultimate result may be, has substance in it, for it is hardly even the petitioner-appellant's case that the company is unable to pay the debt it owes him. It has been stated here that he expects to obtain all his dues in full in the liquidation. Thus therefore it appears that the petitioner's object is to bring the pressure of insolvency proceedings to bear upon the company in order to make it pay cheaply and expeditiously a heavy debt which it desires to dispute in the civil Courts, and this, we are both very strongly of opinion, is one of the worst abuses to which the winding-up sections of our statute law upon companies could be perverted. We are clearly of opinion that the learned Judge below was right, and that his order ought to be confirmed and this appeal dismissed with costs.

G.P./R.K.

*Appeal dismissed.***A. I. R. 1914 Bombay 252**

BEAMAN AND HAYWARD, JJ.

Arjun Raghu Narole—Applicant.

v.

Krishnaji Venimadhav Valimbe — Opponent.

Civil Appln. No. 147 of 1913, Decided on 16th June 1914, against First Class Sub-Judge, Satara, in Misc. Appln. No. 2 of 1913.

Civil P. C., (1908), O. 21, R. 101—Decree transferred to Collector — Though Court passing decree is *functus officio* for execution purposes, when Collector exhausts all his powers, all things to be done in execution must be done by Court passing decree.

When a decree is transferred to a Collector the Court which passed the decree is for the time being *functus officio* for all purposes of execution; but as soon as the Collector has exhausted all the powers of execution conferred upon him, any matters requiring to be done, and usually regarded as in execution, must be done by the Court which made the decree. [P 253 C 1]

*Jayakar and K. N. Koyajee—*for Applicant.

*Gadgil and B. R. Patwardhan—*for Opponent.

Beaman, J.—A decree was sent to the Collector for execution under S. 68, Civil P. C. The Collector appears to have put up the property of the judgment-debtor for sale, to have sold it, and given the purchaser a sale certificate. Thereafter the present opponent, claiming to be in possession in his own right, appears to have obstructed the auction-purchaser, and the Collector removed him, as he has power to do, under R. 14 (1) made under S. 70, Civil P. C. Thereupon the opponent went to the Court which passed the decree and obtained from it an order under R. 101, O. 21. Against this the present applicant, the auction-purchaser, has moved this Court in the exercise of its extraordinary jurisdiction to declare that the Subordinate Judge's order under O. 21, R. 101, was made, in the circumstances stated, without jurisdiction. I think that the true answer to the question which arises here, a question which must frequently arise in similar cases, is that the execution entrusted to the Collector was completed and must have been completed before the Court which made the decree, could properly be invited to make or certainly before it could properly have made, any order under R. 101. I agree that in principle there could not be two

(1) [1870] L.R. 11 Eq. 149=23 L.T. 585=19 W.R. 225.

(2) [1880] 16 Ch.D. 246=43 L.T. 694=29 W.R. 20=31 L.J.Ch. 10.

Courts executing the same decree at the same time, and this appears to me to have been the reason underlying Burkitt, J's., decision in *Muhammad Said Khan v. Payag Sahu* (1). But when we examine the rules framed under S. 70, and it is under those rules alone that the Collector exercises his powers, it will be seen that in the execution of the decree he is authorized to do a certain number of necessary acts, while, on the other hand, his powers are much less extensive than those conferred upon an ordinary Court executing its own decree under O. 21. So that while I do not demur to the principle I have stated, namely that after a decree has been transferred to a Collector the Court which passed that decree is for the time being functus officio for all purposes of execution, I also say that as soon as the Collector has exhausted all the power of execution conferred upon him by R. 14 framed under S. 70, then any matters requiring to be done, and usually regarded as in execution, such as those provided for in Rr. 97 to 103, for example, of O. 21, must be done by the Court which made the decree. Otherwise there might certainly arise situations in which parties have suffered wrong at the hands of a Collector tied down by the rules conferring upon him very restricted powers, and yet be entirely without redress. This can never have been the intention of the legislature, and, were authority needed, I might refer to a decision by Sir Lawrence Jenkins to which I myself was a party in *Pita Moti v. Chunilal* (2). There again, I think, the reason is precisely and accurately stated by the learned Chief Justice and that reason will certainly cover the present case. We are therefore of opinion that the order complained of was not ultra vires, but made in the exercise of jurisdiction vested in the learned Judge who made it, and was very properly made. The rule must therefore be discharged with all costs.

Hayward, J.—This application raises the question whether a Collector's order dispossessing a third party in execution under R. 14 of the rules in force under S. 70, Civil P. C., can be called in question by that third party by application

to the Court under Rr. 100 and 101 O. 21, Civil P. C.

The powers of the Collector in execution must be looked for either in Sch. 3 or in the rules in force or framed under S. 70 of the Code. Where powers are conferred on the Collector, the effect is to oust the jurisdiction to that extent of the Court as provided by sub-S. 2, S. 70 of the Code. Now the Collector has been granted power to dispossess third parties in execution under R. 95, O. 21 of the Code by the inclusion of that provision in R. 14 in force under S. 70 of the Code. But the Collector has not been granted power to hear the grievances of third parties after being so dispossessed in execution under Rr. 100 and 101, O. 21 of the Code. This power must therefore be deemed to have been left with the Court and not to have been taken away under sub-S. 2, S. 70 of the Code. "If the power has by rules been vested in the Collector, then it is exercisable by him and not by the Court. If that power has not been conferred on him, then the power must continue still to be exercisable by the Court," as was stated by Jenkins, C. J., in the case of *Pita Moti v. Chunilal* (2).

The rule on this application must therefore in my opinion, also, be discharged with costs, inasmuch as it proceeds on the alleged want of jurisdiction of the lower Court.

G.P./R.K.

Rule discharged.

A. I. R. 1914 Bombay 253

HEATON AND SHAH, JJ.

Daji Abaji Sawant and others—
Plaintiffs—Appellants.

v.

Sakharam Krishna Kulkarni—Defendant—Respondent.

Second Appeal No. 742 of 1913, Decided on 29th July 1914, from decision of Addl. 1st Cl. Sub-Judge, Ratnagiri, in Appeal No. 443 of 1912.

Civil P. C. (1908), O. 41, R. 27.—In admitting additional evidence appeal Court must comply with R. 27.

In admitting additional evidence, it is necessary for an appellate Court to comply with the provisions of O. 41, R. 27, and if it thinks either with the consent of the parties or on the application of any one of them, that there is sufficient ground to admit certain papers, the reasons for admitting them in evidence should be stated, and the papers should be formally admitted in evidence. [P 254 C 1]

(1) [1894] 16 All. 228=(1894) A. W. N. 55.

(2) [1907] 31 Bom. 207=9 Bom. L. R. 15.

D. W. Pilgaokar—for Appellants.

Nilkanth Atmaram—for Respondent.

Judgment.—The main point argued in this appeal relates to the question of the admissibility of certain evidence which the lower appellate Court considered for the first time in appeal. That evidence consists of certain papers relating to a revenue inquiry. During the course of the argument we were led to think that these papers were looked at and considered by the Court without the knowledge and consent of the present appellants. It turns out, however, that these papers were sent for expressly on the application of the plaintiffs, and the pleaders on both sides were heard after these papers were received and before the judgment was pronounced. No objection has been taken to this procedure in the memorandum of appeal to this Court. Under these circumstances it is quite clear that, so far as the present appellants are concerned, they have no just grievance at all as regards the procedure adopted by the lower appellate Court with reference to these papers.

At the same time we think that it was necessary for the lower Court to have complied with the provisions of R. 27, O. 41 before taking these papers into consideration; and if it thought, either with the consent of the parties or on the application of any one of the parties, that there was sufficient ground to admit these papers, the reasons for admitting them in evidence should have been stated, and they should have been formally admitted in evidence. The lower appellate Court no doubt acted improperly in considering the papers without formally admitting them in evidence. But having regard to the facts which we have already mentioned, it is quite clear that the appellants cannot be allowed to object to the procedure which they invited the Court to adopt.

On a consideration of the whole evidence in the case, including these papers, the lower appellate Court has come to definite conclusions on questions of fact, viz., that the plaintiffs have not proved their title, and that the defendant has been in possession of the lands for over twelve years prior to the date of the suit. These findings must be accepted. On these findings it

is quite clear that the decree passed by the lower appellate Court is proper.

We, therefore, confirm the decree of the lower appellate Court with costs.

G.P./R.K.

Decree confirmed.

A. I. R. 1914 Bombay 254

BEAMAN AND HAYWARD, JJ.

Venidas Narandas and others—Plaintiffs—Appellants.

v.

Bal Hari—Defendant—Respondent.

Second Appeal No. 147 of 1912, Decided on 18th June 1914, from decision of Dist. Judge, Ahmedabad, in Appeal No. 208 of 1910.

(a) **Bombay Bhagdari and Narwadari Act (1862), S. 3—Rights existing in persons not Bhagdars or Narwadars before Act—Such rights are not portion of Bhags or shares of Bhagdari or Narwadari village within S. 3.**

Where rights are found to have existed before the Act, in persons not themselves Bhagdars or Narwadars, but the locus of whose rights falls within what are called the Bhags or shares in the Bhagdari and Narwadari village, these rights are not the portion of such Bhags or shares of Bhagdari or Narwadari village, etc., within the meaning of S. 3, and the prohibitions against alienation contained therein do not apply. [P 255 C 1]

(b) **Bombay Bhagdari and Narwadari Act (1862), S. 3—Sale of interest of permanent tenant of land in Bhag before Act sold—Sale set aside by Collector putting owner of Bhag in possession—Alienation by permanent tenant held not prohibited under S. 3 and Collector's action to be wrong.**

Where a permanent tenant of lands in a Bhag before the passing of the Act sold in 1907 his interest in the lands to the plaintiffs, but the sale was set aside by the Collector who put the defendants (the owner of the entire Bhag) in possession in a suit to recover possession.

Held: (1) that the alienation by the permanent tenant was not prohibited by S. 3 of the Act and was not null and void and (2) that the Collector was wrong in removing the plaintiffs and putting the defendants in possession. [P 255 C 2]

G. K. Parekh—for Appellants.

G. N. Thakor—for Respondent.

Beaman, J.—One Sakhidas, claiming to be a permanent tenant of lands in a Bhag, sold his permanent tenancy right to the plaintiffs. The Collector, after the death of Sakhidas, intervened under S. 3, Bombay Act 5 of 1862, removed the plaintiffs, and placed the bhagdar, now defendant, in possession. The plaintiffs then brought this suit and the Courts below decided against them.

On second appeal a Bench of this Court consisting of Scott, C. J., and Chapdavarkar, J., remanded three issues

to the lower appellate Court. The first two are interesting, because they indicate clearly enough that at that time the learned Judges were disposed to think that if permanent tenants existed in these Bhagdari and Narwadari tenures their rights of alienation could only be restricted by custom. It might be difficult to reconcile that opinion with another decision given by Scott, C. J., and Batchelor, J., in *Jijibhai v. Nagji* (1); but for the purposes of this judgment it will be sufficient, I think, to confine that case to its own facts, bearing in mind particularly the course of this litigation.

These three issues having been found upon by the lower appellate Court, the first two virtually in favour of the present plaintiffs-appellants, the case came on a second time before Scott, C. J., and Batchelor, J. Those learned Judges again remanded two issues to the lower appellate Court because in the then state of the record it did not appear that it had either been found on the evidence or admitted that the plaintiffs' vendor was a permanent tenant. The lower appellate Court has found on the two issues so remanded that the plaintiffs' vendor was a permanent tenant, and that the permanent tenancy dated back to a time prior to the passing of the Bhagdari Act of 1862. This is clearly a finding of fact, and the decision of the case must be based upon the vendor of the plaintiffs having been a permanent tenant of the land within a Bhag before the enactment of 1862. Having regard to the policy of that Act expressed in the preamble, and to the general reason of its provisions in respect of alienations, we think that it is not necessary to give an absolutely literal and verbal interpretation to the very sweeping language of S. 3. But even were that necessary we should still with some confidence, hold that on the facts found a permanent tenancy precedent to the passing of the Act of 1862 was a right in the permanent tenant not described in S. 3 by the words "any portion of a bhag or share, etc." As we understand that section, its intention was to preserve a certain tenure, called the Bhagdari or Narwadari tenure, and the status of persons enjoying that tenure and the means devised by the legislature were clearly intended

to prevent the dismemberment of lands belonging to such privileged classes under that tenure. But we think that it cannot be said that the mere geographical position of the lands held in permanent tenancy before the passing of that Act necessarily prevents alienations of such tenancies within either the verbal definition or the spirit of S. 3. If the learned Judges who first remanded this case were right in contemplating at least the possibility of an existing permanent tenancy, should such be found, being alienable, unless restricted by custom, notwithstanding the provisions of S. 3, then there would be no difficulty whatever in holding after the findings of fact on the second remand that the plaintiffs' vendor was such a permanent tenant before 1862, and that no custom has been proved restricting his right of alienation. The principle to which we seek to give effect, although it may be difficult to reconcile with the single decision I have referred to in *Jijibhai v. Nagji* (1), is at least intelligible, simple and capable of uniform application, and that is, that where rights are found to have existed before the Bhagdari Act, in persons not themselves Bhagdars or Narwadars, but the locus of whose rights fell within what are called the Bhags or shares in the Bhagdari and narwadari village, those rights never were "any portion of such Bhags or shares of Bhagdari or Narwadari village etc," within the meaning of S. 3, and therefore it will follow naturally that the prohibitions against alienations contained in S. 3 would have no applicability to the class of cases we are describing. It appears to us that this is clearly such a case, and therefore that the alienation by the permanent tenant to the present plaintiffs was not prohibited under S. 3, was not null and void, and therefore the Collector was wrong in removing the plaintiffs.

For these reasons we think that the plaintiffs' claim, including mesne profits, to be determined in execution, must be decreed with all costs.

Hayward, J.—I entirely concur. It appears to me that the permanent tenancy was a good alienation inasmuch as it took effect before the passing of the Bhagdari Act (Bom. Act 5 of 1862). The permanent tenancy so created thereupon ceased to be any portion of the Bhag.

(1) [1909] 8 I. C. 761.

It became independent property carved out of what was previously the Bhag. The only rights left were the rights to receive rent from the permanent tenant. That was the only interest left in the Bhag. No custom has been shown limiting in any way the right of alienation of a permanent tenant and there would ordinarily be nothing to prevent a permanent tenant giving full rights to his alienee, notwithstanding the fact that on failure of his own heirs there might, in default of alienation, have been a reversion to the Bhagdar. The only property rendered inalienable was the right already referred to of receiving rent from the permanent tenant which remained vested in the Bhagdar. That and that alone could properly be held to come within the definition of "portion of a Bhag" and to have been rendered inalienable by the subsequent passing of the Bhagdari Act of 1862.

G.P./R.K.

*Appeal accepted.***A. I. R. 1914 Bombay 256**

BATCHELOR AND SHAH, JJ.

Subrao Mangesh Chandavarkar—Appellant.

v.

Mahadevi Manji Bhatta--Respondent.

Second Appeal No. 808 of 1912, Decided on 25th July 1913, from decision of Dist. Judge, Kanara, in Appeal No. 23 of 1912.

Hindu Law — Joint family — Coparcener's share attached before judgment—Judgment-debtor dying after decree but before execution—Right of ownership is not defeated by attachment—Attachment must be under decree and in his lifetime,

Where a coparcener's share in a joint Hindu family property has been attached before judgment and he dies after decree, but before the decree-holder makes an application for execution, the decree-holder cannot be deemed to have taken any measures to which could be attributed the effect of defeating the right by survivorship.

The right by survivorship is defeated only in a case where a parcener's interest having been attached in his lifetime under a decree obtained against him for the separate bond debt, and a sale having subsequently been held under the attachment, the judgment-debtor dies between the date of the attachment in execution and the sale. [P 257 O 1, 2]

S. S. Patkar—for Appellant.

K. H. Kelkar—for Respondent 2.

Judgment.—This is an appeal in execution proceedings, and it arises upon these facts :

The appellant on 1st November 1906

obtained a money decree against one Bellabhatta. Prior to the decree, i. e. on 23rd October 1906, the appellant had obtained attachment before judgment of the property in suit, as being the property of Bellabhatta. Some time in 1907 Bellabhatta died. Admittedly he was in union with respondent 2, and the property was joint family property, which on Bellabhatta's death would ordinarily have passed to respondent 2 by survivorship. Nothing further was done under the decree till 1909 and 1911 when the appellant made applications for execution.

The question is whether, in these circumstances, the respondent's title by survivorship was defeated by the appellant's attachment before judgment. Both the lower Courts have answered this question in the negative. In our opinion that is the correct answer.

It would seem that there is no reported decision which precisely covers the present facts, but the nearest discoverable authority is the judgment of the Privy Council in *Suraj Bunsî Koer v. Sheo Persad Singh* (1). Both sides have accordingly relied upon this case, and the determination of the present appeal turns mainly on the correct construction of the Privy Council's judgment. Now in *Suraj Bunsî Koer's* case (1) there had been not a mere attachment before judgment, but an attachment in execution and an order for sale: indeed the sale itself would have taken place but for the judgment-debtor's applications for postponement. It was upon these facts that the judgment proceeded, their Lordships saying that "the execution proceedings, under which the mauza had been attached and ordered to be sold, had gone so far as to constitute, in favour of the judgment-creditor, a valid charge upon the land," which could not be defeated by the debtor's death before the actual sale. It would appear therefore that the ground of the judgment was that in that case the judgment-creditor had carried execution proceedings so far as to give himself a valid charge upon the property; and this interpretation has the authority of Sir John Edge, C. J., in *Jagannath Prasad v. Sitaram* (2). If

(1) [1880] 5 Cal. 148=6 I. A. 88=4 C. L. R. 226 (P. O.).

(2) [1889] 11 All. 302=(1889) A. W. N. 81.

this view is right, then we think that the Privy Council's judgment is authority against the present appellant. For, prior to Bellabhatta's death, the appellant had not only not carried execution proceedings to a point where a charge might be held to have been created, but had in fact instituted no execution proceedings at all. All that he had done was to obtain an attachment before judgment, a mere precautionary measure which admittedly creates no charge. Indeed in *Moti Lal v. Karabuldin* (3) Lord Hobhouse, in speaking even of an attachment in execution, says that it "only prevents alienation; it does not confer title."

It follows from the above considerations that the appellant has taken no measure to which could be attributed the effect of defeating the respondent's right by survivorship. And on principle we cannot see any ground upon which the appellant could succeed, for when the right by survivorship accrued to the respondent there was not in existence any competing right or title at all; in other words, there was nothing to arrest the accrual of the respondent's right. This conclusion is supported by the decision of the Madras High Court in *Ramanayya v. Rangappayya* (4), where the right of the survivor was held to prevail despite an attachment before judgment. It is true that in that case the defendant had died before the decree was passed, but that circumstance does not, we think, make any difference of substance; for in this case owing to the absence of execution proceedings, as in that case owing to the death of the judgment-debtor before decree, the attachment before judgment did not become effective to render the property available for sale until after the right of survivorship had accrued. For the attachment before judgment, though it enured for the benefit of the creditor, did not avail to render the property saleable until the first application for execution was made in 1909, that is, long after Bellabhatta's death: see *Pallonji Shapurji Mistry v. Edward Vaughan Jordan* (5).

This view as to the rights of the pre-

sent parties has also the support of the high authority of Westropp, C. J., in *Udaram Sitaram v. Ranu Panduji and Venku Panduji* (6), where the Chief Justice noticed the case of *Goor Pershad v. Sheodeen* (7). With the observations as to the alienability of a coparcener's share in this Presidency, we have no concern, but the judgment shows that the Chief Justice and West, J., "fully concurred" in the decision of *Goor Pershad v. Sheodeen* (7), so far as that decision held that where the coparcener's share had been attached, and attached in execution proceedings, and the coparcener had died before the actual sale, the judgment-debtor at his death had left no right at all in the property, and there was consequently nothing in connexion with it which was liable to be sold. It is true that though the execution proceedings in *Goor Pershad v. Sheodeen* (7) were not carried so far as in *Suraj Bansi Koer's* case (1), yet the former decision must be taken to have been overruled by the Judicial Committee at least to this extent that it can no longer be held that the right by survivorship is to be defeated only by an actual sale during the judgment-debtor's lifetime. That however leaves matters only at this point that the right by survivorship is defeated in a case where, a parcener's interest having been attached in his lifetime under a decree obtained against him for his separate bond-debt, and a sale having subsequently been held under the attachment, the judgment-debtor dies between the date of the attachment in execution and the sale.

Here the facts are much stronger in favour of the surviving coparcener, since, as we have noticed, no proceedings in execution had been taken by the creditor at the time of the coparcener's death, nor was any sale ever held, but the solitary circumstances on which the creditor can rely is the attachment before judgment. We are brought back, therefore to the question whether such an attachment can be held to be operative to defeat the survivor's right for, in *Suraj Bansi Koer's* case (1), their Lordships say: "It seems to be clear upon the authorities that if

(3) [1908] 25 Cal. 179=24 I. A. 170=1 C. W. N. 689.

(4) [1894] 17 Mad. 144.

(5) [1881] 12 Bom. 400.

(6) [1874] 13 B. H. C. R. 76.

(7) [1872] 5 N. W. P. H. C. R. 137.

the debt had been a mere bond debt, not binding on the sons by virtue of their liability to pay their father's debts, and no sufficient proceedings had been taken to enforce it in the father's lifetime, his interest in the property would have survived on his death to his sons, so that it could not afterwards be reached by the creditor in their hands." On the facts of this suit, we are of opinion, for the reasons stated, that this is such a case, and that no sufficient proceedings have been taken by the creditor to enforce his claim during the debtor's lifetime.

Mr. Patkar has contended on the authority, respectively, of *Ganu Singh v. Jangi Lal* (8) and of *B. Krishna Rau v. Lakshmana Shanbhogue* (9), first, that an attachment before judgment stands for all purposes on the same footing as an attachment in execution, and, secondly, that an attachment in execution creates a valid charge and is sufficient to defeat the right by survivorship. This latter proposition however which is otherwise doubtful, no longer has the support of the Madras High Court: see *Sankaralinga Reddi v. Kandasami Tewari* (10) and *Zemindar of Karvetnagar v. Trustee of Tirumalai, Tirupati* (11). And the former proposition is equally devoid of authority; for all that the learned Judges decided in *Ganu Singh's* case (8) was that an attachment before judgment and an attachment after judgment had the same effect for one particular purpose namely, binding the property so as to prevent private alienations. Here there is no question of any private alienation, and the appellant's contention must, consequently, be disallowed.

For these reasons, we are of opinion that the lower Court's decree is right, and we dismiss this appeal with costs.

G.P./R.K. *Appeal dismissed.*

(8) [1899] 26 Cal. 531.

(9) [1882] 4 Mad. 302.

(10) [1907] 30 Mad. 413=17 M. L. J. 334.

(11) [1909] 32 Mad. 429=2 I. C. 18.

A. I. R. 1914 Bombay 258.

HEATON AND SHAH, JJ.

Emperor—Prosecutor.

v.

Gana Krishna Walunj—Accused.

Criminal Ref. No. 58 of 1914, Decided on 2nd October 1914, made by Addl. Sess. Judge, Poona.

Criminal P. C (5 of 1898), S. 345—Parties stating in writing signed by them that compoundable offence is compounded—Magistrate cannot call further evidence to prove it.

Where the parties are entitled of themselves to compound a case and put in a written paper signed by themselves stating that the offence is compounded they have proved that the offence is compounded and a Magistrate is not entitled to call for further evidence to prove it. [P 359 C 1]

S. S. Patkar—for the Crown.

Heaton, J.—In this case as disposed of by the Magistrate, three persons were convicted of the offence of hurt under S. 323, I. P. C. One was sentenced to a fine of Rs. 100, the other two to a fine of Rs. 50 each. The one on whom the appealable sentence was imposed appealed, and the conviction was reversed on the ground that the offence had been compounded. We hold that the Sessions Judge very properly sent the case to us, submitting that the convictions of the accused of the two non-appealable sentences may also be set aside.

We have not of course it is not usual to have the explanation of the Magistrate for his proceedings, and in the absence of any explanation I confess I do not understand them and find some difficulty in dealing with them. There is no doubt whatever that the complainant and the accused put in before the Magistrate a writing signed by them, in which the complaint states that she does not wish to proceed and that the case has been compounded. There is no doubt, seeing that this was a case of hurt, that the complainant could compound the case without the permission of the Court. But the Court, as I understand it, came to the conclusion that its own permission was needed, that is, unless I have misunderstood the purport of the Magistrate's judgment. He seems to have come to this conclusion on the strength of a passage in para. 6 of the Resolution of Government in the Judicial Department, No. 7969 of 4th November 1912. It is there stated that "Magistrates would also do well to scrutinize requests made to compound offences. Permission to do so should only be accorded when a composition is actually offered by the accused and accepted by the complainant." That advice on the part of Government can only apply to cases where the permission of the Court is needed in order that the case may be compounded. It cannot apply to cases where the person

injured is entitled of himself to compound the case. The law on the point is clearly enough laid down in S. 345, Criminal P. C. But the Magistrate thinking that he must take some action of his own, called on the parties to prove that the case was compounded, and he says that the parties have not even attempted to prove it. This is a part of the Magistrate's judgment in particular which I do not understand. When the parties had of themselves put in a written paper signed by themselves there is no doubt whatever on these points and when that paper states that the offence is compounded, then it seems to me that the parties have not only attempted to prove, but have in fact proved, that the offence is compounded. That this was so is further demonstrated by what followed when the Magistrate refused to treat the case as compounded and went on to take evidence. The complainant said that she had compounded the case and stated later that the facts alleged in the complaint were not true. That seems to me to be further evidence, if further evidence were needed, that she was determined for her part not to go on with the case against the persons whom she had originally accused. That again is entirely consistent with the view that she had compounded the case. Indeed, how the idea ever entered the Magistrate's mind that the case had not in fact been compounded is another matter which I am unable to understand. It seems to me to be clear beyond any possibility of doubt that the case was compounded in fact. And seeing that it was a case which the complainant could compound without the permission of the Magistrate it was also compounded in law.

Therefore, the convictions of accused 2 and 3 in this case must be set aside and the fines, if paid, ordered to be refunded.

The order as to payment of court-fees made by the trying Magistrate is also set aside.

Shah, J.—I agree. It is clear in this case that the offences with which the accused were charged by the complainants were compoundable and that they were in fact compounded by the person concerned. There being no doubt whatever about the fact of the offences having been compounded, it is clear that

under Cl. 6, S. 345 Criminal P. C. the accused ought to have been acquitted.
G.P./R.K. *Order accordingly.*

A. I. R. 1914 Bombay 259

SCOTT, C. J. AND BEAMAN, J.
Mahamadali Kamruddin and others
—Defendants 1 to 26—Appellants.

v.
Abdulali Karimbhai—Plaintiff—Respondent.

Second Appeal No. 953 of 1913, Decided on 21st July 1914, from decision of Asst-Judge, Ahmedabad, in Appeal No. 76 of 1912.

Transfer of Property Act (1882), S. 60—House site and field mortgaged—Former sold to stranger and latter purchased by mortgagee who set off purchase money against mortgage debt—Suit to recover balance by sale of house site—Stranger held not deprived of his right of redemption.

Where, out of a house site and a field mortgaged the house site was sold to a stranger who thereby acquired a right to redeem the whole property and the mortgagee subsequently purchased the field and set off the purchase money pro tanto against the mortgage debt and sued to recover the balance by sale of the house-site:

Held: that as the sale to mortgagee was subsequent to the acquisition of the house site by the stranger and was without his privity or consent, he had not been deprived of his right of redemption which had been in existence since he purchased the house-site
[P 259 C 2, P 260 C 1]

K. N. Koyajee—for Appellants.

Ratanalal Ranchhoddas—for Respondent.

Judgment.—In this case the property of a mortgagor was mortgaged to the plaintiff. It consisted of a house-site and a field. Subsequently the house, subject to the mortgage, was sold to defendants 1 to 26. The defendants then had a right to redeem the whole property. After this purchase the plaintiff by arrangement with the mortgagor purported to acquire the field for Rs. 1,200 and set off the price pro tanto against the mortgage-debt. He now sues the purchasers of the house to enforce the balance of the mortgage-debt by sale of the house. The defendants as such purchasers claim to be entitled to redeem the original mortgage and to take over the field upon such redemption. It is clear that they would be entitled to do so if the field had not been sold out and out to the plaintiff. But that sale was subsequent to the acquisition of the house-site by

the defendants, and it was without their privity or consent. We, therefore think that they have not been deprived of their right of redemption which was in existence since they purchased the house-site, and their offer to pay to the plaintiff the amount of Rs. 1,200, which had been set off against the mortgage-debt at the time of the alleged transfer of the equity of redemption of the field, should have been allowed. We, therefore, set aside the decree of the lower appellate Court and decree that the defendants be at liberty to redeem the mortgage by payment of Rs. 1,628-12-0 (British) together with interest at 4 per cent. upon Rs. 428, part thereof, from the date of suit until redemption within six months, and upon redemption we decree that the plaintiff do transfer the field to them free from incumbrances, but that if the mortgage-debt be not paid within six months, the field be taken as representing Rs. 1,200, and that the house-site be sold and the proceeds applied to satisfy the balance of the mortgage-debt. If the property is redeemed the mortgagee will be entitled to the costs of the institution of this suit to be added to the mortgage-debt. But he must pay to the defendants the costs of the hearing in the first Court and the costs of the two appeals. If the defendants do not redeem within six months they must pay all the costs of the plaintiff.

G.P./R.K.

*Decree varied.***A. I. R. 1914 Bombay 260**

SCOTT, C. J. AND DAVAR, J.

R. D. Sethna—Appellant.

v.

Jwalaprasad Gayaprasad—Respondent.

Civil Appeal No. 17 of 1914 and Civil Suit No. 1219 of 1912, Decided on 27th August 1914, from judgment of Macleod, J.

(a) **Hundi**—Payment of amount of hundi to endorsee and not to shah on security of railway receipt cannot be recovered if security turns out to be forgery—Payor is entitled to refund if notice in reasonable time is given and claim for refund is communicated to payee without delay.

Where a person pays to another the amount of a hundi, not as to a shah, but as to an endorsee for collection of a hundi on the security of a railway receipt, he has no equity to recover back the amount from such other if the security turns out to be a forgery. In

such a case the latter is liable to refund the money or to trace the hundi to its source, provided notice is given within a reasonable time of the discovery of the forgery, that is, provided the payor loses no time in making this communication and claiming the refund.

[P 262 C 1]

(b) **Hundi**—Lost or stolen hundi is genuine—Shah accepting payment thereon is not liable.

Obiter—In the case of a lost or stolen hundi, the hundi is ex hypothesis genuine, and therefore the liability of a shah who is paid does not rest on a guarantee of genuineness.

[P 262 C 1]

(c) **Negotiable Instruments Act (1881), S. 27**—Liability of holder endorsing bill of exchange and passing it on under English law is only that of surety for drawer and acceptor.

The liability of a holder who endorses a bill of exchange and passes it on under English law is only that of a surety for the drawer and the acceptor, but his position does not involve any liability to the acceptor.

[P 262 C 1]

Setalvad and Desai—for Appellant.*Kanga and Vakil*—for Respondent.

Judgment.—This is an appeal from a decree of Macleod, J., dismissing the suit.

The suit was filed by Bansidhar Lachminarayan, now an insolvent and represented by the Official Assignee, to recover from the defendants Rs. 3,000 with interest from 10th June 1912 upon a plaint containing the following alienations.

On 10th June 1912 the plaintiff received a letter, addressed to his firm in Bombay, purporting to be from one Ramlal Ramprasad of Harpalpur in Alipur State in the Bundelkhand Agency. The letter enclosed what purported to be a railway receipt for 300 bags of linseed stated to have been consigned by Ramlal from Ranipur Station, and the plaintiff was asked to sell the goods and meantime to accept and pay on presentment two hundis for Rs. 3,000 each, dated 15th Jeth Sudi 1969, drawn by Ramlal in favour of the second defendant Firm of Munalal Gayaprasad. On the same day one of the hundis, being a shahjog hundi drawn on the plaintiff by Ramlal in favour of Munalal, was presented by defendant 1 and on the same day the other hundi mentioned in the letter was presented by Gopaldas Vallabdas.

Defendant 1's firm being respectable shroffs and fulfilling the qualifications of a Shah, the plaintiff paid them the amount of the hundi on their responsibility according to the well-esta-

blished custom in regard to shahjog hundis. The plaintiff delivered the railway receipt to one Kilachand in fulfilment of a contract for sale of linseed and received from Kilachand Rs. 5,600. As the goods mentioned in the railway receipt never arrived, the plaintiff in August took back the railway receipt and refunded the amount paid by Kilachand. He was informed by the Railway Company on 22nd August that the railway receipt appeared to be a fabrication. The plaintiff also began inquiries on his own account, from which he had reason to believe that the second defendant firm belonged to Kamalprasad Munalal, the Station Master of Harpalpur, that no such person or firm as Ramlal Ramprasad, by whom the hundis purported to be drawn, ever existed and that the hundis and the railway receipt were fabricated by the said Kamalprasad Munalal or by some one at his instigation or in collusion with him for the purpose of defrauding the plaintiff. The plaintiff says that in accordance with the well-established custom among shroffs, and according to the rules of the Marwari Panch Shroff Association in respect of hundis, the shah who obtains payment of a shahjog hundi is, in the event of the hundi turning out to be a false, fraudulent, stolen or forged hundi, bound to refund the amount of the hundi with interest, unless he produces the actual drawer or the person who committed the fraud.

It was proved at the hearing that the above statement of facts as appearing in the plaint was not correct in that the hundi was presented for payment to the plaintiff on 10th June by defendant 1 and payment was then refused and was only made on the 11th after the arrival that day of the railway receipt and after the payment by Kilachand of Rs. 5,600, being 90 per cent of the price of the linseed supposed to be represented by the railway receipt. It was also proved that the Marwari custom referred to in the plaint as declared in the rules of the Marwari Association is that "in case of a hundi coming in any fraudulent way if the party receiving the amount of the hundi receives it as a shah, he is absolved from liability if he traces the hundi to its source. But if he does not do so he must re-pay the amount of the hundi with interest."

According to the statement in the plaint the fraudulent way here referred to covers not only the case of a forged but also of a stolen or lost genuine hundi. To the same effect is the plaintiff's deposition. The first issue raised was whether the hundi in question was paid on the responsibility of defendant 1 as a shah and in accordance with the custom alleged.

The plaintiff, with reference to this issue deposed that he did not know the writer Ramlal or the firm of Munalal Gayaprasad, and if he had not got the railway receipt he would not have paid the hundi. He only paid on the hundi and another hundi presented by another firm of shroffs up to ninety per cent of the value of the goods. He paid the defendant's hundi in full and the other in part. He received Rs. 5,600 for the railway receipt from Kilachand before he paid the defendants. The learned Judge however disposed of issue 1 by saying: "The Shah does not guarantee the solvency of the drawer; he guarantees the genuineness of the hundi. A drawee will not pay a hundi unless he has funds in his hands belonging to the drawer or is willing to give him credit. And he will not pay on presentation of a shahjog hundi to a Shah unless he is satisfied as to the respectability of the shah as he looks to him in case of anything afterwards going wrong with the hundis: see *Davlatram Shriram v. Balakidas Khemchand* (1). Therefore this issue is somewhat meaningless." We are unable to accept this view which was also pressed upon us by the appellant's counsel. In the case decided by Sir Joseph Arnould it was common ground that if payment were made to a shah as such on a hundi which afterwards turned out to be stolen or lost the drawee who has paid is entitled to a refund from the Shah to whom it has been mistakenly paid (unless he otherwise discharges himself in the customary way). Sir Joseph Arnould says at p. 29: "It seems to me that this evidence strongly tends to show that the drawee of the hundi in accepting and paying it looks very mainly to the shah as responsible in case of anything afterwards going wrong with the hundi and that he relies on the solvency, and respectability of the shah as one of the

(1) [1869] 6 B. H. O. R. 24.

principal grounds in inducing him to make payment without further inquiry"

But in the case of a lost or stolen hundi the hundi is *ex hypothesi* genuine therefore the liability of a Shah who is paid does not rest on a guarantee of genuineness. The liability of a holder who endorses a bill of exchange and passes it on under English Law is only that of a surety for the drawer and the acceptor but his position does not involve any liability to the acceptor.

We find it difficult to say what is the idea underlying the Marwari custom. It is perhaps this: that of two innocent parties, the one nearest in the line of successive holders to the person who committed the fraud must find out the guilty party at the risk of otherwise having to recoup the innocent payor. In the present case however it appears to us that the first defendant was paid not as a shah but as the indorsee for collection of a hundi purporting to be drawn against the security of a document representing 300 tons of linseed for payment was in fact refused until the railway receipt came to hand and had been sold for cash and no more was paid to the holders of the hundis than the exact amount realized on the railway receipt. This is a state of affairs not dealt with or contemplated in *Davalatram Shriram v. Balkidas Khemchand* (1). The rules of the Marwari Association which have been put in relate to cases where the party who receives the amount of the hundi receives it as a shah. If the plaintiff simply paid on the security of the railway receipt he would have no equity to recover back the amount from the defendant: (1) see *Leather v. Simpson* (2) and *Baxter v. Chapman* (3).

Assuming however that there might be a liability imposed on defendant 1 by reason of the payment to refund or to trace the hundi to its source this would only be the case provided notice was given within a reasonable time of the discovery of the forgery that is provided the plaintiff lost no time in making this communication and claiming the refund: see *Dalvatram Shriram v. Bulakidas Khemchand* (1). The duty of the plaintiff cannot be put lower than

this although the Hindu law merchant may not be so strict as to notice of dishonour as the English law as to which see *Megraj Jagannath v. Gokaldas Mathuradas* (4). It is however quite clear that the plaintiff knew long before the end of August that the hundis and the forged railway receipt were part of a fraudulent scheme of kite-flying perpetrated by Kamalprasad, the Station Master of Harpalpur, the owner of defendants 2, firm, yet no notice was given till the demand of refund on the 25th September to the plaintiff, who in his ignorance had continued to deal with and give credit in account to defendant 2 firm up to the end of the Maru year. It was upon this ground that the lower Court dismissed the suit and we agree that it was a sufficient ground.

We are also of opinion that the hundi had been "traced to its source within the meaning of the Marwari Association rules before defendant 1 received intimation of the fraud and that defendant 2 firm was in the circumstances "the person from whom the forged hundi was brought" within the contemplation of Sir Joseph Arnould's judgment. The learned Judge thinks, not because defendant 1 only sent the hundi for collection to defendant but as he gave credit in account for the proceeds he was in effect the buyer of the hundi see *Mulchand Joharimal Suganchand Shivdas* (5).

If the defendant was only the holder for collection of a hundi handed to him by defendant 2's firm who was the actual payee (and as it appears also the drawer) defendant 2 firm would be the proper defendants to proceed against: see *London and River Plate Bank v. Bank of Liverpool* (6).

We affirm the decree and dismiss the appeal with costs throughout excluding however the costs of cross-objections other than that as to costs.

G.P./R..K.

Appeal dismissed.

(4) [1870] 7 B. H. C. R. 137.

(5) [1875-77] 1 Bom. 29.

(6) [1896] 1 Q. B. 7 at p. 12=65 L. J. Q. F. 80=73 L. T. 472.

(2) [1871] 11 Eq. 398=48 L. J. Q. 177=1

Asp. M. G. 5=24 L. T. 286=19 W. R. 431.

(3) [1873] 29 L. T. 642=2 Asp. M. G. 170.

A. I. R. 1914 Bombay 293 (1)

SCOTT, C. J. AND HEATON, J.

Datto Atmaram Hasabnis—Plaintiff—Appellant.

v.

Shankar Dattatraya—Defendant—Respondent.

Second Appeal No. 648 of 1911, Decided on 23rd July 1913, from decision of Dist. Judge, Satara, in Appeal No. 35 of 1911.

Civil P. C. (1908), O. 34—Application for decree absolute for sale of mortgage charge under consent decree fixing instalments made after three years from date of last instalment becoming payable falls within Limitation Act (1908), Art. 181.

An application under O. 34, Civil P. C., for a decree absolute for sale of a mortgage charge, the property of the defendant, under the terms of a consent decree, fixing instalments, made after the expiry of three years from the due date of the last instalment, becoming payable, falls within the scope of Art. 181, Lim. Act, and is therefore barred.

[P 263 C 1]

S. R. Bakhale—for Appellant.*K. N. Koyajee*—for Respondent.

Judgment.—The application in this case is for a decree absolute for sale of a mortgage charge, the property of the defendant under the terms of a consent decree. The consent decree provided for satisfaction of the decretal debt by instalments. Three years from the due date of the last instalment becoming payable expired in July 1910. The application which we are now considering was made subsequent to that date. The question is whether it was barred by limitation. The lower Courts have held that the debt due to the plaintiff was moveable property, and that therefore there was no need for an application for a decree absolute. They based the decision upon *Turvadi Bholanath v. Bai Kashi* (1). The question there turned upon whether the execution proceedings had been initiated under the right section of the Civil Procedure Code. That question does not arise in the present case. But although we cannot accept the reasons of the lower Courts we think that the application must fail. The reason is that this is an application in form for a decree under O. 34, Civil P. C., and it is contended on behalf of the appellant that it must be treated as under O. 34, and no other order. That being so it is an application under the Civil Procedure Code,

(1) [1902] 26 Bom. 305=1 Bom. L. R. 12.

and as such falls within the scope of Art. 181, Lim. Act: see *Amolak Chand Parak v. Sharat Chandra Mukherjee* (2). The application under Art. 181 must be made within three years from the time when the right to apply accrues. It has not been made within that period, and is therefore barred. We therefore dismiss the appeal with costs.

G.P./R.K.

Appeal dismissed.

(2) [1911] 33 Cal. 913=11 I. C. 943.

A. I. R. 1914 Bombay 263 (2)

HEATON AND SHAH, JJ.

Emperor—Prosecutor.

v.

Hanmaraddi Ramaraddi—Accused.

Criminal Confirmation Case No. 3 of 1914, Decided on 9th March 1914, passed by Sess. Judge, Dharwar, in Criminal Appeal No. 42 of 1912.

(a) Criminal P. C. (1898), S. 162—Oral statements by witness to police officers in investigation are admissible to corroborate witness's testimony in trial Court—Evidence Act (1872), S. 157.

Under S. 162, Criminal P. C. policeman can be allowed to depose to what witness had said to him in the course of the investigation for the purpose of corroborating the testimony of that witness before the trial Court. [P 265 C 1]

(b) Criminal P. C. (1889), S. 162—Writing.

Per *Shah, J.*—Section 162 excludes only the writing. [P 266 C 1]

Velinkar and *V. V. Bhadkamkar*—for Accused.

S. S. Patkar—for the Crown.

Heaton, J.—A certain Hanmaraddi has been convicted of the murder of Rama Valikar and has been sentenced to death. The case comes before us for confirmation of that sentence and also on the appeal of the convict.

It appears that about 22nd August 1913 the corpse of a man, whose head was almost severed from his body, was found in the village of Haleratti. On making inquiries the police discovered from the neighbouring villagers that the murdered man had been accompanied by another man and a woman. They were all strangers to that locality. Neither the identity of the murdered man nor his companions was at the time ascertained. About a month later however the identity of the murdered man came to be suspected. His wife was questioned and thereafter the police were enabled to make complete inquiries. They discovered that the murdered man was one Rama and that his com-

panions were the accused and the deceased's wife Honnava. It was found that Honnava had for some time been living at Makrabi where the accused also lived, that her husband had been working at another village, Megal, that he had taken his wife from Makrabi for a time and that thereafter he and his wife set out to go to Haveri and were joined on the way by the accused. On their journey these three persons crossed the ferry between Bannimatti and Galagnath, whence they proceeded to the place where the corpse was subsequently found. From there Honnava and the accused returned, spending the night at a village on the way and recrossing the ferry on the following day. This gave the police an opportunity of which they availed themselves of tracing the movements of these persons and identifying the individuality of each. They have been enabled to put before the Court perfectly credible evidence of all the circumstances that I have stated. Then there is the evidence of the dead man's wife Honnava, who describes how her husband was murdered. It is said that she is an accomplice witness. However that may be, we must, in a case of this kind, regard her evidence with caution, because whether an accomplice or not, she was present at the murder and for weeks thereafter she gave no information about the crime and it is proved that she had illicit intimate relations with the accused. It does not seem to me to matter in the least whether you call her an accomplice or not. Her evidence must be valued in relation to these circumstances. However, in the light of the surrounding circumstances, from the undoubted truth of the facts that the three persons travelled together, that one of them was left dead where his body was found and that the other two returned to their village together, there can be little doubt that the man was murdered by one or both of them. This conclusion is fortified by the subsequent conduct of the accused himself who gave an untrue account of his proceedings and had two letters written at intervals of about a fortnight which were designed to induce people to believe that the murdered man was still alive and working in a distant village. Here, again, the evidence is, to my mind, credible and in-

deed convincing. Taking the circumstances as a whole, they leave no doubt whatever that the accused was the man, whether helped by the woman or not it does not matter, who killed Rama.

The credit of the elucidation of these circumstances is mainly due to the promptness and intelligence of the police inquiry, and for that inquiry, I gather, Balwant Vyankatesh, Sub-Inspector of Haveri, is mainly responsible.

For these reasons I confirm the conviction and also the sentence in this case.

There has arisen and has been discussed a point as to the meaning of S. 162, Criminal P. C. It appears that amongst the villagers, who were near the scene of the offence when the murder took place, was a boy who happened to see the three persons. The deceased's wife, before the committing Magistrate, stated that she had not seen this boy. Before the Sessions Court she stated that she had seen him. On this state of facts the defence might very easily and with no other facts bearing on the point known with some force argue that the woman had changed her story, that the earliest known account of the matter which she gave was less favourable to the prosecution case than that she gave to the Sessions Court and thereon they might very properly found an argument that the witnesses had been tampered with and that the case presented clear indications of that kind of influence which properly ought to raise doubts in the mind of the trying Judge. To rebut an argument of this kind it was proved from the mouth of the investigating police officer that to him the deceased's wife had said that she saw the boy. If what the investigating police officer says be true, then it completely destroys the defence argument. The question argued before us is, whether the police officer could, as the law stands, be allowed to depose to what this woman had said to him for the purpose of corroborating what she said before the Sessions Judge. My own opinion is that the police officer could depose to that effect. I do not propose to discuss the various authorities which have been referred to. Lengthy arguments on this very point find a place in the

books. I will only say that I do not think that either by its terms or by its intention S. 162, Criminal P. C., prohibits the Court from receiving such evidence for such a purpose.

Shah, J.—I concur. The learned Sessions Judge has examined the evidence with great care in an exhaustive judgment and has considered all the arguments urged in favour of the defence. Substantially the same arguments have been urged before us. Generally speaking, I agree with the lower Court in its appreciation of the evidence and with the inferences drawn by it.

It is not disputed before us that the deceased, whose body was found on 22nd August last, was Rama, the husband of Honnava, and the evidence in the case clearly establishes the fact.

I accept the evidence of Honnava and Gudda as true in the main. Honnava's evidence, no doubt, must be received with caution, though I do not accept the argument that she is an accomplice. She did not give out her present story soon after the occurrence and gave varying accounts from time to time, which was to a certain extent natural under the circumstances. Having regard to the proved circumstances in the case, I am inclined to believe her present account that she saw the accused killing the deceased. As to the evidence of Gudda, quite apart from the fact, whether he was seen by Honnava or not, I accept it as true, despite the criticism of Mr. Velinkar on his evidence. The fact of the journey of the deceased and Honnava in the company of the accused is proved by reliable evidence in the case. The subsequent conduct of the accused, which I do not propose to examine in detail, lends strong corroboration to the prosecution story. It is enough to refer to his association with the letters Exs. 27 and 28. The accused is proved to have taken those letters to Satyava, which appear on the evidence to have been written at his instance. It is proved that the deceased was never at Amlikop. The obvious inference that arises from the proved conduct of the accused is that he was trying to conceal the death of Rama, which was known to him. On a careful consideration of the evidence and the arguments advanced on behalf

of the accused, I have no hesitation in coming to the conclusion that the deceased Rama was murdered by the accused. The circumstances connected with the crime demand that the sentence should be confirmed.

The police investigation in this case appears to me to have been made with unusual ability and thoroughness, and affords a telling illustration of the manner in which a case could be investigated without the aid of a confession.

I desire to allude to a point which has been raised before us in connexion with Honnava's evidence. It has been pointed out that though she stated before the committing Magistrate that she did not see any Kuruar boy then, she now denies having made that statement, and says that she had seen a boy from Haleritti. It is urged that the statement before the committing Magistrate represents the truth. Even then I do not think that the main conclusion in the case is affected in any way. It is urged on behalf of the prosecution however that the argument is based upon a misapprehension of facts and that the Sub-Inspector has been examined to show that Honnava stated before the police that she did see a boy at the time. The question of law that arises is, whether the prosecution can be allowed to adduce oral evidence in proof of her statement before the police in order to corroborate her testimony at the trial. Her statement to the police was admittedly reduced to writing, and it is common ground that such writing cannot be used as evidence. Mr. Velinkar contends, and not without force, that it would be unreasonable to allow any oral evidence of the statement to be given when the writing containing the statement cannot be proved. On the other hand it is argued on the strength of S. 157, Evidence Act, that the right of the prosecution to corroborate the testimony of any witness under that section is not taken away by S. 162, Criminal P. C., which only provides that the writing shall not be used as evidence. The point is not free from difficulty which is sufficiently reflected in the diversity of judicial opinions bearing on the question. The judgment of Knox, J., in *Rustom v. Emperor* (1) and the observations of Beaman, J., in

(1) [1910] 6 I. C. 101.

Emperor v. Narayan Raghunath Patki (2) represent one side of the question and the judgment of Karamat Husain, J., in the case of *Rustom v. Emperor* (1) and the decisions in *Fanindra Nath Banerjee v. Emperor* (3); *Emperor v. Nilkanta* (4) and *Muthukumaraswami Pillai v. Emperor* (5) represented the other side. I have carefully considered the question, and on the whole I incline to the view that, looking to the plain language of S. 162, Criminal P. C., the writing only is excluded from evidence, but the right to prove any statement made to the police by oral evidence to corroborate the testimony of any witness is not taken away by that section. This conclusion derives support from, or is at least in consonance with, the view taken by this Court in *Emperor v. Babaji* (6) in which the Court, while directing a re-trial, ordered that the chief constable should be examined as to the statements made to him by the witnesses during the police investigation. Such an order would be inappropriate, if the oral evidence of the statements were inadmissible. The anomaly, if any, can be remedied by the legislature. Our duty plainly is to construe the section without unduly straining the language used by the legislature. I think therefore that the evidence of the Sub-Inspector was rightly admitted on this point. At the same time I think that under ordinary circumstances the admission of the oral evidence of the statements made to the police, when they are reduced to writing is not in keeping with the spirit of S. 162, Criminal P. C., and the existence of exceptional circumstances would be absolutely necessary to give any appreciable value to such evidence. In this case for instance Honnava's statement in question at the trial deserves to be credited, not simply because the Sub-Inspector says that she had made a statement to that effect to him, but mainly on the additional ground that though it was suggested in her cross-examination that she had made a contradictory statement before the committing Magistrate, it could

not be suggested to her that her earlier statement to the police on this point was in conflict with her present version and that the Sessions Judge did not ask her any question on this point, though she was re-called on 8th January after the Sub-Inspector was examined and questions on other points, arising out of her statement reduced to writing before the police, were put to her by the Court.

G.P./R.K.

Conviction confirmed.

A. I. R. 1914 Bombay 266

SCOTT, C. J. AND HEATON, J.

Dakore Town Municipality—Defendants—Appellants.

v.

Anupram Haribhai Travadi—Plaintiff—Respondent.

Second Appeal No. 211 of 1913, Decided on 11th July 1913, from decision of Dist. Judge, Ahmedabad, in Appeal No. 351 of 1911.

Bombay District Municipal Act (1901), Ss. 113 and 122—Whether encroachment objected to exists for 12 years or more is immaterial under S. 113 or S. 122—Statutory conditions regulating exercise of power must be fulfilled.

Under S. 113 or S. 122 it matters not whether an encroachment which is objected to has been in existence for 12 years or more, the statutory conditions regarding the execution of power under either section must be shown to exist. [P. 267 C 1]

M. K. Mehta—for Appellants.

G. N. Thakore—for Respondents.

Judgment.—In this case the plaintiff has obtained an injunction against the Dakore Municipality to restrain them from obstructing him in re-instating a stone which was formerly imbedded in his ota in its original position, and Rs. 2 for damages for wrongful removal of the stone. The learned Judge has based his decision upon a finding that this stone had been in situ for 12 years and that therefore the municipality had no right to interfere with it, as there had been adverse possession for the statutory period of the portion of the street occupied by the stone. We do not think that this is a good reason for the decision. The municipality is the creature of the statute with duties inter alia to preserve the passage along public streets, and, under Ss. 113 and 122, District Municipal Act, it is given certain powers depending upon the existence of certain conditions for the removal of encroachments or obstructions upon the

(2) [1908] 32 Bom 111=6 Bom. L.R. 789=6 Cr. L. J. 164=2 M. L. T. 414 (F. B.).

(3) [1909] 1 I. C. 970=36 Cal. 281.

(4) [1912] 14 I. C. 849=35 Mad. 247.

(5) [1912] 14 I. C. 896=35 Mad. 397.

(6) [1907] 9 Bom. L. R. 366=5 Cr. L. J. 353.

streets. Under S. 113, if it is proved that the encroachment objected to is an obstruction to the safe and convenient passage along a street, the municipality may by written notice require the owner to remove it. Under S. 122, the municipality have power to remove an encroachment which may have been set up after the place has become a Municipal District. It matters not in either case whether the encroachment has been in existence for 12 years or more but the statutory conditions regulating the exercise of the power must be shown to exist. The municipality in the present case have not shown either that the stone which they have removed was an obstruction to the safe and convenient passage along the street or that the stone was set up by the plaintiff after the place became a Municipal District. They have therefore not justified their action by reference to their statutory powers. On that ground, we affirm the decree of the lower appellate Court and dismiss the appeal with costs.

G.P./R.K.

Appeal dismissed.

A. I. R. 1914 Bombay 267 (1)

SCOTT, C. J., DAVAR AND BEAMAN, JJ.

Thomas G. G. French—Plaintiff.

v.

Julia French—Defendant.

Civil Ref. No. 6 of 1914, Decided on 28th August 1914, made by Asst. Judge, Dharwar.

Bombay Civil Courts Act (14 of 1869), S. 16—Suit under Divorce Act for dissolution of marriage cannot be referred by District Judge for trial to Assistant Judge—Divorce Act (1869), S. 10.

Section 16, Bombay Civil Courts Act does not authorize a District Judge to refer for trial to an Assistant Judge suits under Divorce Act for dissolution of marriage. Such suits cannot appropriately be described as applications under a special Act. They are suits, but not suits the subject matter of which is capable of valuation. [P 267 C 2]

Judgment.—This is a decree passed by the Assistant Judge of Dharwar for dissolution of marriage under the Divorce Act. The Assistant Judge presumed that he had jurisdiction, believing that the suit had been referred to him for trial by the District Judge under S. 16, Bombay Civil Courts Act. We have referred to the District Judge, and we find that, as a matter of fact, the case was not referred by him to the Assistant Judge, but it seems to have

been sent to the latter by the clerk of the Court, as though it were a mere matter of administrative routine, and the question of referring it under S. 16 was never brought before the District Judge at all.

We are of opinion however that, even if it had been referred by the District Judge to the Assistant Judge, the latter would have had no power to deal with the case under S. 16, Bombay Civil Courts Act; for though S. 16 empowers the District Judge to refer to the Assistant Judge suits, where the subject matter does not exceed a certain amount or value, and applications or references under special Acts, it does not, in our opinion, authorize him to refer suits for dissolution of marriage, for we think that such suits cannot be appropriately described as applications under a special Act. They are suits: see Ss. 4, 6, 7, 8 and 15, Divorce Act, but not suits the subject matter of which is capable of valuation. Being of opinion that S. 16 does not authorize any reference to an Assistant Judge to decide a suit under the Divorce Act, we must decline to confirm the decree.

Under S. 115, Civil P. C., we set aside the decree which has been passed and remand the case to the District Judge for trial.

G.P./R.K.

Decree set aside.

A. I. R. 1914 Bombay 267 (2)

SCOTT, C. J. AND BATCHELOR, J.

Keshavlal Hirallal—Appellant.

v.

Girdharilal Uttamram Parekh—Respondent.

First Appeal No. 218 of 1913, Decided on 22nd July 1914, from decision of Dist. Judge, Ahmedabad, in Misc. Appln. No. 141 of 1911.

Companies Act (1882), S. 158—Lease providing that on lessee-company's delay in payment of rent landlord would recover arrears from building erected on land—Charge giving priority to landlord over unsecured creditors of company on liquidation held to be created.

Where a lease provided that if the lessees (a company) caused delay in payment of rent, the landlords would be entitled to recover the arrears with interest from the buildings which may have been erected on the land.

Held: (1) that in equity a charge was created on the buildings when they came into existence, and (2) that although the charge did not amount to a transfer or a mortgage, it gave

a right of priority to the landlords over the unsecured creditors of the company in winding up. [P 268 C 1]

G. S. Rao—for Appellant.

S. S. Patkar—for Respondent.

Judgment.—The only point that we have to dispose of in this appeal is whether the claim of the appellants for rent accrued due under the lease, under which the company enjoyed the property upon which the mill buildings were erected before the date of the winding-up, could be satisfied out of the proceeds of the mill buildings in priority to the claims of unsecured creditors. The lease of which the company have taken the benefit provided that: "If the lessees cause delay in paying the rent the landlords should give one month's notice, and in spite of that if the lessees or their representatives do not pay the arrears of rent within one month, the landlords may recover the arrears of rent with interest at the rate of 8-annas per cent per month from the building or buildings which may have been erected on the land and from the person and property of the tenants." No question has been raised as to the want of notice under that clause, but what we have to consider is whether the clause gives a charge to the landlords for unpaid rent upon the buildings when the buildings came into existence. We think that in equity a charge was created upon the buildings when they came into existence, as is shown by the judgment in *Holroyd v. Marshall* (1). But the charge does not amount to a transfer or a mortgage, and the further question arises whether in equity such a charge will give a right of priority to the landlords in a winding up. That it will do so seems to be taken as settled law in the judgment of Lindley, J., in *Andrew v. Swansea Cambrian Benefit Building Society* (2), where he says that a general charge upon the assets of the company, although not amounting to a mortgage, will give the holder of the charge priority over the unsecured creditors. We must therefore allow the appeal, directing the liquidator to pay out of the proceeds of the buildings upon the land the sum of Rs. 1,937-8-0 with interest

at 6 per cent in priority to unsecured creditors. The appellants are entitled to their costs out of the assets of the company in both Courts.

G.P./R.K.

Appeal allowed.

A. I. R. 1914 Bombay 268

BATCHELOR AND SHAH, JJ.

Shankar Venkatesh Karguppi — Defendant—Appellant.

v.

Sadashiv Mahadji Kulkarni—Plaintiff—Respondent.

First Appeal No. 237 of 1912, Decided on 16th July 1913, from decision of First Class Sub-Judge, Belgaum, in Darkhast No. 312 of 1908.

(a) Transfer of Property Act (1882), S. 74—Suit by prior mortgagee—Second mortgagee not made party to prior mortgage decree is not bound by it—He can redeem first mortgage and is entitled to have mortgage amount determined as between himself and first mortgagee.

A second mortgagee can be and should be made a party to a suit by the prior mortgagee on his mortgage. But if the second mortgagee is not made a party to the prior mortgage decree, he is not bound by it. As a second mortgagee, he would be entitled to redeem the first mortgage and would not be bound to any adjudication as to the mortgage amount between the mortgagor and the first mortgagee. While redeeming the first mortgage, he would be entitled to have the mortgage amount determined again as between himself and the first mortgagee: 31 *Mad.* 258, *Rel. on.* [P 269 C 2]

(b) Transfer of Property Act (1882), S. 75—Decree by second mortgagee on his mortgage, first mortgagee not included—Second mortgagee purchaser in decree execution becomes owner entitled to all rights of mortgagor existing at date of mortgage—Second mortgagee purchasing with Court's leave is not deprived of his rights.

If a second mortgagee obtains a decree on his mortgage, without impleading the first mortgagee and in execution of the decree himself purchases the property at the auction sale, he becomes the owner not only of the mortgagor's rights but also of the mortgagee's rights, in other words, he becomes entitled to all the rights of the mortgagor as existing at the date of the mortgage.

In such a case the rights of the second mortgagee as mortgagee do not become extinguished if he purchases the property with the leave of the Court. Leave to bid puts an end to the disability of the mortgagee and puts him in the same position as any independent purchaser. [P 270 C 1, 2]

(c) Transfer of Property Act (1882), S. 75—Second mortgagee's incumbrance cannot be extinguished by auction purchase—Court presumes incumbrancer's intention to keep incumbrance on foot if it is for his benefit in absence of contrary intention.

The second mortgagee's incumbrance is not extinguished by the auction-purchase as it is

(1) [1861] 10 H. L. C. 191=39 L. J. Ch. 193=9 Jur. (n.s.) 213=7 L. T. 172=11 W. R. 171=138 R. R. 103=11 E. R. 999.

(2) [1850] 50 L. J. Q. B. 428=44 L. T. 106=29 W. R. 382=45 J. P. 507.

clearly for his benefit to continue the incumbrance. In the absence of any evidence to the contrary, a Court should presume that the incumbrancer intends to keep the incumbrance on foot if it is clearly for his benefit to do so. [P 270 C 2]

K. H. Kelkar—for Appellant.

C. A. Rele—for Respondent.

Judgment.—This is an appeal arising out of certain execution proceedings under the following circumstances: Certain properties were mortgaged by Venkatesh and others to Vithalrao in 1886. They were mortgaged again to Rao Bahadur Huchrao in 1887 by the same mortgagors. In 1892, Vithalrao obtained a decree on an award on his mortgage against the mortgagors to which decree Huchrao was not a party, and subsequently in the same year he assigned his rights to the kanbargikars, who are now represented by the present plaintiff (decree-holder). In 1896, the Kanbargikars obtained a fresh decree against the mortgagors for the mortgage-debt of 1886 and for other debts, which the mortgagors owed to them, in respect of the lands mortgaged in 1866 and some other lands. This also was a decree on an award and Huchrao was not a party to it. In 1895 R. B. Huchrao got a decree against the mortgagors on his second mortgage directing the sale of the mortgaged property subject to the first mortgage of 1886 in favour of Vithalrao. The first mortgagee and his assigns were not joined as parties to this suit by Huchrao. In execution of his decree, Huchrao, with the permission of the Court, himself purchased the property subject to the first mortgage of 1886, at a Court-sale in or after 1898. Huchrao sold his rights as auction-purchaser to the karguppikars in 1911.

The decree-holder applied in 1908 to execute the decree obtained on an award in 1896 against the mortgagors, and to bring to sale all the properties—including the properties, which were mortgaged to Vithalrao in 1886 and again to Huchrao in 1887. The application was made in the first instance against the mortgagors or their legal representatives. Subsequently on the decree-holder's application, Huchrao and the Karguppikars were joined as defendants 7, 8 and 9 respectively in the present execution proceedings.

The facts as stated above are admitted by both the parties. In the lower Court several issues were raised. But the controversy in this appeal is confined to issues 11 and 14. The lower Court held that Huchrao and the Karguppikars were necessary parties to these proceedings, and that they were bound by the decree under execution though they were not parties to it. In the appeal, which has been preferred by defendants 8 and 9 (the karguppikars) against the order made by the lower Court on the basis of the above findings, the correctness of the findings on both the issues is questioned.

It is contended on behalf of the appellants that they are not bound by the decree but that they are entitled to redeem the first mortgage in favour of Vithalrao and to have the mortgage amount determined again. So far as the appellant's right to redeem the mortgage of 1886 is concerned, the decree-holder does not contest it. The real point in dispute between the parties is whether or not the present appellants are bound by the decree under execution.

The appellants have got all the rights which Huchrao had and if Huchrao would not be bound by the decree, the appellants clearly would not be bound by it. It is necessary, therefore, to consider Huchrao's rights. We think that Huchrao not being a party to the decree is not bound by it. Huchrao as a second mortgagee could have been and should have been joined as a party to the decree of 1892 as well as to the decree of 1896. But he was not so joined. Considering Huchrao's position simply as a second mortgagee, we think it is clear that he would be entitled to redeem the first mortgage and would not be bound by any adjudication as to the mortgage amount between the mortgagors and first mortgagee. While redeeming the first mortgage, he would be entitled to have the mortgage amount determined again as between himself and the first mortgagee. This appears to us to be a necessary consequence of the second mortgagee not being made a party to the suit between the mortgagors and the first mortgagee.

In the case of *Umes Chunder Sircar v. Mt. Zahoor Fatima* (1), their Lordships observe that "persons who have taken transfers of property subject to a mortgage cannot be bound by proceedings in a subsequent suit between the prior mortgagee and the mortgagor to which they are never made parties." The cases of *Tenappa Chettiar v. Marimutu Nadan* (2), and of *Debendra Narain Roy v. Ramtaran Banerjee* (3), also support the same view.

We have so far considered the position of Huchrao as a second mortgagee. In the absence of anything more, the decree could not be binding upon Huchrao. But it is argued on behalf of the plaintiff (decree-holder) that because Huchrao obtained a decree on his mortgage, had the property sold in execution, and purchased it himself at the auction-sale, his right as second mortgagee has been extinguished, and that as a purchaser he is bound by the decrees by which the original mortgagors were bound at the date of the auction-sale. In our opinion this contention is based upon a misconception of the auction-purchaser's position in the case of a mortgage-decree. In a number of decisions of this Court it has been held that the purchaser at an auction-sale becomes the owner not only of the mortgagor's rights but also of the mortgagee's rights or, in other words, the purchaser becomes entitled to all the rights of the mortgagor as existing at the date of the mortgage: see *Khevraj Jusrup v. Lingaya* (4), *Dadoba Arjunji v. Damodar Raghunath* (5) and *Maganlal v. Shakra Girdhar* (6). If this rule is applied to the present case it is clear that as auction-purchaser Huchrao became entitled to all the rights which the mortgagors and the mortgagee had at the date of the sale, i. e., to all the rights of the mortgagors as they existed at the date of the mortgage, upon which the decree was based. Thus by the purchase Huchrao obtained some additional right, but there was no derogation from any of

the rights, which he possessed as second mortgagee before the sale. It has been urged that when the purchaser is the mortgagee himself, the rights of the mortgagee become extinguished, and the purchaser gets only the mortgagor's rights. We think that the circumstance that the purchaser is the mortgagee himself and not a third person makes no difference in the result, so far as the present point is concerned. Huchrao as auction-purchaser got all the rights which a stranger would have got as a purchaser and nothing less. As observed by their Lordships of the Judicial Committee in *Mahabir Pershad Singh v. Macnaghten* (7) "leave to bid puts an end to the disability of the mortgagee, and puts him in the same position as any independent purchaser." It is not denied in this case that Huchrao purchased the property after obtaining leave to bid.

It is further urged that Huchrao did nothing to show that he intended to keep alive his mortgage. We do not think that it was necessary for him to do anything to keep the rights alive. By virtue of the purchase he got certain rights as purchaser which include the rights of the mortgagee. His rights as second mortgagee are not directly asserted as such but as having passed to Huchrao the purchaser. To the state of facts, such as we have neither S. 101, T. P. Act, nor the principle underlying that section has any application. Assuming however that the section or the principle thereof applies, it is clear that under S. 101, T. P. Act, the incumbrance was not extinguished, as it was clearly for the benefit of Huchrao to continue it. Even apart from S. 101, T. P. Act, the result would be the same. It is a well-established rule that a Court should presume, in the absence of any evidence to the contrary, that the incumbrancer intends to keep the incumbrance on foot, when it is for his benefit to do so. In the present case, Huchrao must be presumed to have intended to keep it alive, as it was clearly for his benefit to do so: see *Gokuldoss Gopaldoss v. Puranmal Premsukhdas* (8)

(1) [1891] 18 Cal. 164=17 I. A. 201=5 Sar. 507 (P. C.).

(2) [1908] 31 Mad. 258=18 M. L. J. 344=4 M. L. T. 293.

(3) [1903] 30 Cal. 599=7 C. W. N. 766 (F. B.).

(4) [1880-81] 5 Bom. 2.

(5) [1892] 16 Bom. 486.

(6) [1898] 22 Bom. 945.

(7) [1889] 16 Cal. 682=16 I.C. 107=5 Sar. 345 (P.C.).

(8) [1894] 10 Cal. 1035=11 I.A. 126=4 Sar. 543 (P.C.).

and *Thorne v. Cann* (9). We therefore hold that Huchrao as second mortgagee was entitled to redeem the first mortgage, that as purchaser at the Court-sale in execution of the decree on his mortgage he got that right, that he is not bound by the decree under execution, and that the karguppikars as claiming under him are entitled to redeem the first mortgage in favour of Vithalrao, and to have the amount payable on the said mortgage determined as between themselves and the present decree-holder.

In this view of the case, both parties are agreed that the questions between the decree-holder and the karguppikars cannot be determined in these execution proceedings, but must be left to be decided in a separate suit.

The result therefore is that the appeal is allowed and the darkhast dismissed as against defendants 7, 8 and 9 with costs throughout on the plaintiff.

G.P./R.K.

Appeal allowed.

(9) [1895] 64 L.J. Ch. 1=71 L.T. 352=11 R. 67=(1895) A.C. 11.

A. I. R. 1914 Bombay 271

SCOTT, C.J., AND BATCHELOR, J.

B. N. Lang—Defendant—Appellant.

v.

Heptullabhai Ismailjee—Plaintiff — Respondent.

Original Civil Appeal No. 1 of 1912, Decided on 19th August 1913, from decision of Beaman, J. D/- 3rd December 1912.

(a) Presidency Towns Insolvency Act (1909), S. 17—Power to realise security under S. 17 covers suit by secured creditor to enforce rights under mortgage.

The power of a secured creditor to realize his security under the saving proviso to S. 17 covers the suit by the said creditor for enforcement of his rights under the mortgage.

[P 271 C 1, P 272 C 2]

(b) Presidency Towns Insolvency Act (1909), S. 17—Official Assignee in possession of proceeds of decree assigned by insolvent by way of security is in position of mortgagor in possession of sale proceeds—Official Assignee or insolvent has no right to decree proceeds until mortgagee's claim is satisfied.

The Official Assignee, having executed a decree which had been assigned by the insolvent by way of security, is in the position of a mortgagor who has sold the mortgaged property and is in possession of the sale proceeds. Until the claim of the mortgagee is satisfied the insolvent or his Official Assignee has no right to the proceeds of the decree: 21 I.C. 689, *Ref.*

[P 272 C 1]

Kanga and Taraporewala—for Appellant.

Strangman and Desai—for Respondent.

Beaman, J.—This is a suit by the plaintiff against the Official Assignee to recover a sum of Rs. 2,000 secured by the mortgage of a decretal debt by an instrument, dated 9th June 1910. The defendant replies that the suit is barred by S. 17, of present Presidency Towns Insolvency Act as no leave has been obtained. In support of that contention I am referred to a recent judgment [*Lalchand v. Balkrishna* (1)], delivered by my brother, Davar, J. It appears that shortly afterwards, upon a motion before Heaton, J., this judgment was cited, and that learned Judge, without expressing any opinion of his own, thought it right to follow it. It can only be with the greatest reluctance and the utmost deference to the opinion of my brother Davar, J., that I do not adopt the same view. But I feel unable to accept the conclusion reached by Davar, J. After giving his judgment my best attention I am sensible that there is much to be said for the view he takes and that he has said it as well and as forcibly as possible, yet it appears to me that before that conclusion can be established, the language of S. 17 with its proviso needs so much interpretation, even going to the length of inserting words, which are not to be found in the section or the proviso itself that I should hesitate long before departing from the plain and only meaning of the language used by the legislature. The concluding words of the proviso seem to me to be conclusive, for if there were no such section as S. 17, how could it be said that a secured creditor might not realize his security in the ordinary way by means of a suit? In some cases, it is not easy to say how he could do so by any other means. Take for example the case of an equitable mortgage. Having read the proviso with the section very carefully, and duly considering all the reasoning contained in the judgment of my learned brother Davar, J., it still seems to me that S. 17, which is taken verbatim from S. 9, English Bankruptcy Act of 1883, does, and is intended to, save all the rights of secured creditors as they exist—

(1) [1913] 21 I.C. 689.

ted and were enforceable before the passing of that Act.

(The learned Judge passed a decree in favour of the plaintiff for Rs. 2,000.)

Judgment.—Two questions have been argued in this appeal, first whether the plaintiff was the assignee by way of mortgage of the insolvent's decree, and, secondly, whether this suit, instituted without the leave of the Court, is barred as falling under the general prohibition of suits without such leave contained in S. 17, Presidency Towns Insolvency Act, or whether it is saved by the proviso that the section shall not affect the power of any secured creditor to realize or otherwise deal with his security in the same manner as he would have been entitled to realize or deal with it if this section had not been passed.

On the first question, there can be no doubt that the decision must be in the affirmative, for the evidence is all one way and establishes the claim.

The Official Assignee, having executed a decree which had been assigned to the plaintiff by way of security, is in the position of a mortgagor who has sold the mortgaged property and is in possession of the sale proceeds. Until the claim of the mortgagee is satisfied, the insolvent or his Official Assignee has no right to the proceeds of the decree. It is argued that the saving proviso to S. 17 does not cover the present suit because the power of a secured creditor to realize his security does not include a suit for enforcement of his rights. We are unable to accept this view. A suit is one of the recognized methods of realization of mortgage securities. The expression "realize his security" is quite an appropriate and well-recognized term to include all the remedies of the mortgagee. The following are examples of its use in practice in relation to mortgagee's suits:

In *In re David Lloyd and Co., Lloyd v. David Lolyd and Co.*, (2), Jessel, M. R. says: "Now, as a rule, a mortgagee has a right to realize his security, and of course, as incidental to that, a right to bring an action for foreclosure."

In Yate Lee on Bankruptcy Act of 1883, under G. R. 73 (p. 627), the following note occurs: "In 1852 by 15 and 16 Vic. C. 86, S. 48, the Court of Chancery

was, for the first time, authorized to direct the sale of a mortgaged property, instead of a foreclosure of the equity of redemption; and from that time, applications by a mortgagee for realization of a security given by a mortgagor who became bankrupt, were usually made in chancery, the reason being that in chancery the mortgagee, as plaintiff, usually had the conduct of the sale, whereas under the rules the trustee of the mortgagor had the conduct unless otherwise ordered, and that under the rules the trustee's costs were made a charge on the property, and might have priority over the mortgage, contrary to the practice in chancery which postponed them to the mortgagee's claim. This is still the case under the present rules; and a mortgagee can therefore generally realize his security to greater advantage, by applying to the Chancery Division, than by applying in Bankruptcy."

Lastly, we may refer to a rule in *pari materia*, viz. R. 14 (3) of the Companies Winding-up Rules of 1892: "Provided always that nothing in this rule or O. 49, R. 5 of the Rules of the Supreme Court 1883, shall authorize the transfer of any action by a mortgagee or debenture-holder for the purpose of realizing his security."

The necessity for these illustrations arises from the fact that in *Lalchand v. Balkrishna* (1), Davar, J., held that the words "power to realize" in the proviso to S. 17 only had reference to the powers of mortgagees or pledgees to sell the property mortgaged or hypothecated to them without recourse to a suit. In *White v. Simmons* (3), in dealing with a proviso in the same words as that now under discussion, Lord Hatherley declined to hold that where there was "an express reservation of all rights, a mortgagee should be precluded from proceeding in equity to enforce his security."

In our opinion the learned Judge in the present case was right in holding that the proviso to S. 17, covers this suit as a suit by a mortgagee to realize his security.

The appeal must be dismissed with costs.

G.P./R.K.

Appeal dismissed.

(2) [1877] 6 Ch. D. 339=25 W. R. 872=37 L. T. 88.

(3) [1871] 6 Ch. App. 555=40 L. J. Ch. 639=19 W. R. 939.

*** A. I. R 1914 Bombay 273**
Full Bench

SCOTT, C. J. AND HEATON AND
 MACLEOD, JJ.

Sawantrawa Fakirappa Ballurwad—
 Plaintiff—Appellant.

v.

*Giriappa Fakirappa Mudraddi and
 others*—Defendants—Respondents.

First Appeal No. 272 of 1913, Decided
 on 16th July 1913, from decision of First
 Class Sub-Judge, Dharwar, in Civil Suit
 No. 116 of 1912.

*** Dekkhan Agriculturists' Relief Act
 (1879) Ss. 2 and 10-A—Sale deed executed in
 1899, by A living on agriculture—Provisions
 of Act not in force in district in which A
 lived but extended to it in 1905—Suit for
 redemption in 1912, alleging that deed was
 mortgage deed and sought to prove intention
 of parties—A in 1899 held not agriculturist
 and that A could enjoy benefits of favoured
 class under S. 10-A only if he belonged to
 favoured class under Act—Dekkhan Agri-
 culturists' Relief Act (1879), S. 10-A : 36
 Bom. 305, Overruled.**

A document in the form of a sale deed was
 executed in 1899 by one A, who earned his
 living by agriculture. In 1899 the provisions
 of the Dekkhan Agriculturists' Relief Act
 were not in force in the district in which A
 lived, but were extended to the district in 1905.
 In 1912, A brought a suit for redemption
 alleging that the deed was really one of mort-
 gage and sought to give evidence of the inten-
 tion of the parties of the time of the transac-
 tion :

Held : (1) that as the Act was not in force in
 the district in 1899, A was not an "agricul-
 turist" within the meaning of S. 2 of the Act ;
 (2) that A could only be allowed according
 to the provisions of S. 10-A of the Act, to
 enjoy the special benefit of the favoured class
 in disregarding the provisions of S. 92,
 Evidence Act, if he belonged to the favoured
 class, as defined by the Act at the date of
 the transaction : 14 Bom. L. R. 14=36 Bom.
 305, Overruled. [P 273 C 2]

Jaykar and G. S. Mulgaokar—for
 Appellant.

K. H. Kelkar—for Respondent 1.

Campbell and A. G. Desai—for Res-
 pondents 2 and 3.

S. V. Palekar—for Respondent 4.

Scott, C. J.—This suit was instituted
 by the plaintiff for redemption of
 certain property, which she alleged had
 been mortgaged by her husband to the
 defendants by a document, which
 though in form a sale, was in reality a
 mortgage. In order to prove that she
 was a mortgagor it would be necessary
 for her to give evidence of the inten-
 tion of the parties at the time of the
 transaction, namely, in the year 1899,
 and to show that that intention was

not expressed in the deed. This she
 could not do under the provisions of
 S. 92, Evidence Act. But if she was
 enabled to avail herself of the provisions
 of S. 10-A, Dekkhan Agriculturists' Relief
 Act, she could give the proof that she
 desired.

The suit was brought in the Dharwar
 District, to which the provisions of the
 Dekkhan Agriculturists' Relief Act were
 extended in the year 1905. S. 10-A
 enables the Court to inquire into the
 real nature of the transaction in issue,
 provided that the agriculturist, who
 was a party to the suit, claiming the
 benefit of the Act, was an agriculturist
 at the time of the transaction, (in this
 case, in the year 1899). It is argued
 that "agriculturist" in the proviso to
 S. 10-A must not be read by the light
 of the statutory definition, but must
 be interpreted in the general and
 popular sense, and that in that sense
 the mortgagor was earning a living by
 agriculture, and, therefore, falls within
 the proviso.

The difficulty is that S. 2 is peremp-
 tory. It provides that in construing
 this Act, unless there is something re-
 pugnant in the subject or context, the
 following rule should be observed,
 namely, "agriculturist" shall be taken
 to mean a person who by himself or
 by his servants or by his tenants earns
 his livelihood wholly or principally by
 agriculture carried on within the limits
 of a district or part of a district to
 which this Act may for the time being
 extend, or who ordinarily engages per-
 sonally in agricultural labour within
 those limits.

It has been argued that if the statu-
 tory definition is applied to the proviso
 to S. 10-A, we shall have a result re-
 pugnant to the object of the section.
 That does not appear to us to be the
 case. The object of the section is to
 enable a party to the suit to prove,
 notwithstanding the words of the docu-
 ment, what the real intention was at
 the time when the document was exe-
 cuted. Therefore, one must have
 regard to the date of the transaction,
 and he can only be allowed according
 to the provisions of S. 10-A to enjoy
 the special benefit of the favoured class
 in disregarding the provisions of S. 92,
 Evidence Act, if he belonged to the
 favoured class as defined by the statute

at the date of transaction. Therefore, in my opinion, the decision of the Subordinate Judge was correct and this appeal should be dismissed with costs. The case of *Gopal Ghela v. Rajaram Amtha* (1) is cited as showing that this Court has applied the provisions of S. 10-A to a transaction dated 15th June 1869 in the Broach District, to which the provisions of S. 10-A were only extended in January 1911, and to which the provisions of the Dekkhan Agriculturists' Relief Act were only extended long subsequent to 1869. We have good reason to believe that this proviso to S. 10-A was not brought to the notice of the Court at the time of the hearing of that case, and the judgment itself indicates that no point was based upon the proviso, for there is no reference to it throughout the judgment.

Heaton, J.—I concur.

Macleod, J.—I concur.

G.P./R.K.

Appeal dismissed.

(1) [1912] 36 Bom. 305=13 I. O. 851.

A. I. R. 1914 Bombay 274

SCOTT, C. J. AND CHANDAVARKAR, J.

Mt. Aishabai—Plaintiff—Appellant.

v.

Essaji Tajbhai—Defendant—Respondent.

Civil Appeal No. 35 of 1912, Decided on 23rd January 1913, from judgment of Davar, J. in Civil Suit No. 917 of 1910, D/- 19th July 1912.

(a) Civil P. C. (1908), Sch. 2, Para. 15—Suit referred to arbitration with stipulation that arbitrators should proceed without considering adjustments—During proceedings question as to proof of debt of particular item arising—Adjusted account tendered in evidence and objected to by defendant but accepted in evidence in proof of debt—Defendant withdrawing from arbitration—Court asked to set aside award as nullity—Award held valid there being no misconduct of arbitrators.

A suit was referred to arbitration with a stipulation that the arbitrators do proceed on the basis of there having been no adjustments and the adjustments relied upon by the plaintiffs be not taken into consideration by them. During the arbitration proceedings the question arose whether the debt of a particular item was proved. An adjusted account was tendered in evidence by the plaintiff in which account the item appeared, and the signature on which had been admitted by the other side in his written statement. The defendant objected but the adjusted account was accepted in evidence in proof of the debt. The defendant however did not seek the interposition of the reference, he withdrew from the case, and

allowed the inquiry to go on and it was only when the award had been made that he asked the Court to interfere and set the award aside as a nullity.

Held: that the arbitrator's action did not amount to misconduct and the award was valid. [P 278 C 1; P 281 C 1]

(b) Civil P. C. (1908), Sch. 2, Para. 15—Honest though mistaken admission by arbitrators of document is no ground to set aside award.

The honest, though mistaken, admission by arbitrator of a document in violation of a rule of evidence introduced pro hac vice would not be a ground for setting aside an award.

[P 277 C 1]

Raikes, Strangman, Inverarity and Mose—for Appellant.

Setalvad and Kanga—for Respondent.

Scott, C. J.—This is an appeal from a judgment of Davar, J.,* whereby he set aside an award upon motion of the respondent on the ground of misconduct on the part of the umpire named in an order of reference.

The reference was made in a suit filed by the appellant against the respondent to recover the amounts alleged to be due on a mortgage and two deeds of further charge.

In the plaint, an adjustment of account, dated 31st August 1910, was alleged from which it appeared that the sum of Rs. 5,71,770-2-0 was found to be due to the plaintiff which sum had been slightly reduced by payments made by the defendant prior to the date of suit, namely, 11th October 1910.

The defendant by his written statement pleaded that his signature to the said adjustment was obtained by fraud and that accounts should be taken.

On 16th March 1911, a consent order was obtained whereby the suit and all matters in dispute therein were referred to the determination of two arbitrators and in the event of their failing to make their award to Mr. K. F. Modi as umpire.

The defendant's case is that his solicitor made it an indispensable condition of the reference that all alleged adjustments of account should be set aside; and that the plaintiff's attorneys agreed to this and it was accordingly provided by the consent order as follows:

"And it is further ordered that the said arbitrators do proceed on the basis

*See *Haji Ahmad Haji Hassam v. Essaji Tajbhoy*, 17 I.C. 696=14 Bom. L.R. 1007.

of there having been no adjustments, and the adjustments relied upon by the plaintiff in this suit shall not be taken into consideration."

It appears from the plaintiff's affidavit of documents, dated 2nd December 1910, that he relied upon two statements of account adjusted and signed by the defendant, one of which was the basis of and contemporaneous with the earlier of the two deeds of further charge and the other was the adjustment referred to in the plaint and written statement.

The defendant thus describes the proceedings before the arbitrators and the initial proceedings before the umpire in paras. 12, 13 and 14 of his affidavit in the motion.

"12. The arbitrators appointed by the said order of reference took up the reference on 6th April 1911, directed the plaintiff to allow me, this deponent, inspection of all the entries in his own personal books of account relating to the dealings and transactions between us and also directed him to give me inspection of the books of account relating to the plying of said steamers on my account, all which inspection the plaintiff had theretofore refused to give me because of the said adjustment of 31st August 1910 and others before it. Thus as directed by the said consent order of reference the alleged adjustments were set aside. The arbitrators further directed the plaintiff to bring in his accounts. Accordingly, the plaintiff brought in two accounts, one of which contained all the several sums with interest thereon which were alleged by him to have been lent and advanced to me on the mortgage of my properties and were included in the said adjustment of 31st August 1910 and included in addition a sum of Rs. 17,529 for further interest from the date of the said adjustment to 30th December 1910 and an altogether new sum of Rs. 68,251 alleged to be due by me to the plaintiff in respect of the plying of the said steamers. This last mentioned sum was not included in the adjustment of 31st August 1910 nor in the second deed of further charge which was executed on 17th June 1909 in respect of the alleged losses in the plying of the said steamers. It was also not claimed by

the plaintiff and is entered on 21st December 1910 in a fraudulent account got by the plaintiff after the filing of this suit. This account has, in the proceedings before the arbitrators and the umpire, been referred to as the "mortgage account." The plaintiff was also directed to bring in an account of the plying of the said steamers by him on my account. To both these accounts, I, this deponent, was directed to bring in my objections and surcharges. In this manner the accounts between me and the plaintiff were opened up as if there had been no adjustments of account between me and the plaintiff and the same were not taken into consideration.

"13. The arbitrators having omitted to extend the time for making their award at the proper time and there being no possibility of their agreeing owing to a strong bias betrayed in favour of the plaintiff by the arbitrator appointed by him, they had to give up proceeding further and the reference was taken up by the umpire on 8th of September 1911, under the provision in that behalf contained in the order of reference.

"14. The umpire accepted the accounts brought in by the plaintiff and the objections and surcharges brought in by me, this deponent, and the proceedings before him thus commenced on the footing of there being no adjustments. My objections to the mortgage account brought in by the plaintiff were first taken in hand and they were proceeded with in accordance with the usual practice, the burden of proving the items objected to being considered to be on the plaintiff."

It is thus conceded by the defendant that the proceedings were commenced before the umpire on the footing of there being no adjustments.

If the accounts had been taken as settled subject to surcharge and falsification, the burden of proof in regard to the items objected to would have lain upon the objector: see *Gething v. Keighley* (1). Item 1 dealt with was an objection that a sum of Rs. 7,053-8-0 was not due but only Rs. 7,000, because the Rs. 53-8-0 was attributable to interest, if calculated at 9 per cent. In proof of the item objected to, the

(1) [1878] 9 Ch. D. 547=48 L. J. Ch. 45=27 W. R. 283.

plaintiff's solicitor put in without objection the earlier of the adjusted accounts, which had also been put in before the arbitrators, as an admission that the sum claimed had been transferred to the defendant on 13th March 1908. The same item also appears in the adjusted account of 31st August 1910. The defendant then led evidence to show that the interest should have been calculated at 6 per cent only. In the course of that evidence the adjusted account of 31st August was referred to by the defendant's solicitor and was marked for identification at his instance and the same account was afterwards used in cross-examination of the defendant by the plaintiff's solicitor without any objection.

At a later stage of the proceedings when all the items of objection but two, relating to a sum of Rs. 1,300 and to certain bills of costs, had been dealt with or transferred to other accounts for investigation, the plaintiff's solicitor put in the second adjusted account of 31st August 1910 as proof of an admission that a sum of Rs. 1,300 was due by defendant upon a transfer to the plaintiff of a debt due to the defendant by one Mulla Fazalalli, and contended that the onus of proving that the plaintiff had not relinquished his claim against Mulla Fazalalli for this amount with the consent and at the request of the defendant was by the admission shifted on to the defendant.

Although this was merely a repetition of the procedure adopted with reference to the sum of Rs. 7,053.8-0 some months earlier, it gave rise to lively protests on the part of the defendant's solicitor and the umpire was asked to submit a special case for the opinion of the Court, under Cl. 11, Sch. 2, Civil P. C. The umpire said he was doubtful whether that would apply but postponed further consideration of the item of Rs. 1,300 in order to give the defendant's solicitor an opportunity to move the Court if so advised for leave for the umpire to state a special case. This was on 20th March 1912. On 22nd the defendant's solicitor appeared before the umpire and stated that as the umpire had admitted the document containing the adjustment notwithstanding the defendant's objection, the arbitration fell through and

that the defendant was no longer bound to go on with it. He also said that as the umpire had acted in contravention of the order of reference, the defendant put an end to the umpire's authority and retired.

The umpire then requested the plaintiff's solicitor to give notice to the defendant's solicitor that the reference would be proceeded with next day and if he did not attend, the reference would be proceeded with ex parte. This notice was accordingly given by letter of the same date. The following day the reference was proceeded with ex parte and the defendant's solicitor being absent, the surcharges remaining to be dealt with were disallowed. The plaintiff was called and gave evidence of the correctness of the steamer account which had been the subject of 222 objections by the defendant after inspection of the account books relating to it.

The plaintiff's solicitor then withdrew his claim to the Rs. 1,300 and interest thereon so that the defendant's objections were allowed. He also withdrew a claim with regard to certain bills of costs.

This completed the inquiry and an award followed whereby the sum of Rs. 7,06,639 was awarded to the plaintiff with interest at 9 per cent and costs.

The learned Judge was of opinion that the adjusted account could, once it was admitted on the record, be used as a deadly and destructive piece of evidence against the defendant, and that, as the defendant had specifically stipulated in the reference that it should not be so used, its admission by the umpire was misconduct and sufficient ground for setting aside the award. In considering whether this view is correct, the first question which arises is whether the reference contained any unmistakable stipulation which has been disregarded by the umpire.

It appears to me that the passage in the reference relied upon by the defendant is reasonably susceptible of two constructions. It was either a particular and specific, following upon a general, exclusion of all adjustments qua adjustments; or a stipulation that certain documents containing the adjustments should not be admitted in evidence for any purpose. If the defendant's solicitors intended to provide for

complete exclusion of these documents, they did not choose words placing their intention beyond dispute. It is possible to admit a document as evidence in support of a particular item and at the same time exclude it as evidence of a general settlement. Thus in *Middleditch v. Sharland* (2), a general account was decreed against a steward notwithstanding a receipt in full signed by the principal, which was only allowed as proof of a particular payment and not of a general release or discharge upon an account stated.

The acquiescence of the defendant's solicitor in the admission, as prima facie proof of the item of Rs. 7,053-8-0, of the account containing the adjustment of 18th August 1908, and in the cross-examination of the defendant, upon the account containing the adjustment of 31st August 1910, suggests that the defendant's solicitor did not then think that the documents had been excluded for all purposes by the terms of the reference.

It appears from an argumentative paragraph in the defendant's affidavit that the umpire, when he committed the act of misconduct charged against him, conceived an adjustment to be the totalling up of the two sides of an account and the striking of a balance. There is authority for this view. It is stated in Daniell's Chancery Practice (Ch. 8, S. 13), on the authority of *Burk v. Brown* (3) that "a plea of stated account must show that it was in writing, and likewise the balance in writing, or at least set forth what the balance was."

If the defendant's construction of the order of reference is correct, the stipulation relied on was a rule of evidence introduced pro hac vice, and the honest, though mistaken, admission by the umpire of a document in violation of that rule would not be a ground for setting aside the award: see *Goolam Jilani v. Muhammad Hassan* (4). The scope of the reference was not affected by the mistake.

It appears to me that the action of the defendant was incorrect. The umpire,

when asked to state a case, offered to adjourn consideration of the items under discussion for a week in order to give the defendant an opportunity of obtaining the leave of the Court for the statement of a case under Cl. 2, Sch. 2 of the Code. I do not think there would have been any difficulty in framing an award so as to raise the point in dispute as was done in *Scott v. Van Sandau* (5).

The defendant's rejection of this course and his decision to withdraw from the reference without the leave of the Court suggests uncertainty as to his position, and doubts as to the strength of his case on the remaining items of surcharge and steamer account.

In consequence apparently of the strong line taken by the defendant's solicitor, the plaintiff's solicitors, to avoid all disputes gave up the items of Rs. 1,300 and Rs. 26-10 for interest thereon and the award in effect allows the defendant's objections to these items. I doubt whether the admission of the adjusted account in evidence was so fatal to the rest of the defendant's case as the learned Judge thinks. It is pure speculation that it would have been used with fatal effect in resisting the defendant's surcharges. No attempt was made so to use it in the long inquiry into the surcharge of Rs. 5,000. I fail to see also that it would have been of any value on the steamer account items of Rs. 1,270 (objection 30); Rs. 70,893 (objection 32); and Rs. 68,251 (objection 50).

The item of Rs. 1,270 was composed of Rs. 800 for stamp charges and Rs. 470 for transfer fee on 940 shares of the Bombay Steam Navigation Company, as to which evidence must have been easily obtainable.

The items of Rs. 70,803 and Rs. 68,251 were the totals of all items claimed on steamer account for two different periods and the account Ex. H brought in by the plaintiff showing all the items included in those totals was the subject of 222 objections resulting from inspection of the steamer account books. The items of Rs. 68,251 did not appear in the adjusted account at all and the transfer of the objection as to Rs. 70,893 to the steamer account, in-

(5) [1844] 6 Q. B. 297=8 Jur. 1114 = 115 E. R. 92.

(2) [1799] 5 Ves. 87=31 E. R. 485.

(3) [1742] 2 Atk. 397=26 E. R. 640.

(4) [1902] 29 Cal. 167=29 I. A. 51=12 M.L.J. 77=4 Bom. L. R. 161=6 C. W. N. 226=225 P. R. 1902 (P.C.).

quiry shows that it was recognised that it must, if the defendant wished, be dealt with item by item on the defendant's steamer account objections.

For the above reasons, I am of opinion that the umpire's action does not amount to misconduct and that the interests of justice do not require that his award should be set aside.

The judgment appealed from must be reversed and the motion dismissed with costs throughout on the respondent.

Chandavarkar, J.—This is an appeal from an order of Davar, J., setting aside the award made by Mr. Kaikhashru Framji Modi, as umpire on a reference to arbitration by order of the Court in Suit No. 917 of 1910.*

The suit had been brought by the appellant to recover from the respondent the sum of Rs. 5,00,000 and odd due on certain mortgages and other adjusted accounts. In defence the respondent pleaded inter alia that the adjustments were vitiated by fraud and misrepresentation and prayed that "proper accounts should be taken by and under the directions of this Hon'ble Court of all the dealings and transactions" between the parties.

The cause was however referred to arbitration with the consent of the parties by an order of the Court and the material portion of the terms of the reference, with which we are concerned in this appeal, is contained in the provisions in the submission that "the said arbitrators do proceed on the basis of there having been no adjustments and the adjustments relied upon by the plaintiff in this suit shall not be taken into consideration by them."

The arbitrators named in the reference having failed to arbitrate, Mr. Modi, appointed umpire thereby, took their place, and the inquiry before him commenced on 8th September 1911. At the sitting on 19th March 1912, one of the questions before the umpire related to an item of Rs. 1,300 debited by the appellant to the respondent. The question was whether the debit was proved. The onus at the outset lying on the appellant, his solicitor sought to discharge it by tendering in evidence an

adjusted account, in which the item appeared, and the signature on which the respondent has admitted in his written statement.

The respondent's solicitor objected to the admissibility of the said adjusted account on the ground that the umpire had no authority, under the terms of the reference, to look at and take into consideration any adjustment between the parties which had been relied upon by the appellant in his suit.

The umpire overruled the objection of the respondent's solicitor and admitted as A-18 the "account purely as a statement of account acknowledged to have been signed by defendant."

In so admitting the statement, Davar, J., has held that the umpire "was guilty of what in law is called misconduct," inasmuch as the statement, having been an adjustment relied upon by the appellant (plaintiff) in this suit, had been deliberately excluded from the umpire's consideration by the express terms of his authority contained in the reference.

The question before us turns upon the proper interpretation of the clause in the reference which provided that "the adjustments relied upon by the plaintiff in this suit shall not be taken into consideration" by the umpire.

It is contended for the appellant that under that clause every adjustment or settled account in the suit was made inadmissible and outside the jurisdiction of the umpire.

On the other hand, the contention for the appellant is that all the clause in question provided was that the umpire should not treat the account stated as an adjustment and give it the operation it would have in law as such; but that it did not prevent him from receiving it as an ordinary piece of evidence and considering its weight in that character.

In valuing the comparative force of these rival contentions, we must start with the fact that as the suit had been framed, it was on an account stated, so that had it gone to trial in the usual course, it was the respondent who would have had to begin his case at the outset and establish his pleas of fraud and misrepresentation before he could get rid of the binding character of the account and become entitled to go behind it and re-open the whole account between the parties. If those pleas were

* See *Haji Ahmed Haji Hassam v. Essaji Tajbhoy*, 17 I. C. 696; 14 Bom. L. R. 1007.

not proved, it was open to him to prove some one mistake at least in the account stated before he could get the right to surcharge and falsify. In the latter case, notwithstanding the mistake proved, the account stated would have continued to retain its character as such in law and the only liberty allowed to the respondent would have been to prove that certain items had been wrongly credited or wrongly omitted in the account; but he would not have been allowed to go into the general account. In either case, the account stated would have been a bar to all discovery and relief unless the respondent had first established his right to open the account either wholly or partially: see *Story's Equity*, Edn. 2, English S. 523, p. 356; *Gething v. Keighley* (1). The law on the subject is even more tersely but clearly stated in *Coote's Law of Mortgage* (Edn. 5th): "In every case, the account stated is liable to be opened for fraud or the party will be allowed, in case of specific error alleged and proved to surcharge and falsify. He cannot however in the latter case go into the general account though fraud will be a sufficient ground to open the whole account."

When therefore the suit was referred to arbitration the terms of the reference relieved the suit from its nature as an action on an account stated and directed the arbitrators, and on failure of them the umpire to treat it as a suit for a general account between the parties. The respondent became entitled to go behind the account stated without any restrictions as to proof of fraud or specific error and to get discovery. The reference required the umpire not to take "the adjustments" into consideration i.e., not to look at them *qua* adjustments; and not to give them the legal character and operation which an account stated has. But that did not prevent him from looking at them in any other light, so long as he did not by treating the adjustments as accounts stated, deprive the respondent of his right under the terms of the reference to go into the general account and to discovery.

In my opinion therefore the language of the terms of the reference is in favour of the respondent's construction that all the umpire was restricted to was the consideration of the accounts stated in

the suit in the light of adjustments. The language used is apt for the purposes of that construction when the reference says that the umpire shall not take into consideration "the adjustments." In plain English it means he shall not consider the fact that there has been any adjustment. The submission does not say that he shall not receive the account in evidence and consider it at all whether as an adjustment or otherwise.

In any case the language used may fairly be said to be ambiguous, and extrinsic evidence can be admitted to explain the real meaning. We have that evidence afforded by the conduct of the parties in the earlier stage of the inquiry before the umpire to show what meaning they all attached to the term of the reference, which has led to the present dispute.

We find from the proceedings that the inquiry before the umpire having begun on 8th September 1911, on 4th October 1911 on adjustment or account stated (statement marked B) was tendered in evidence by the appellant's solicitor on the ground that by means of the adjustment and his written statement, the respondent had admitted the execution and receipt of consideration and that under those circumstances, the onus of proving that the respondent had not received the moneys of the item then under discussion lay on the respondent. Respondent's solicitor did not then object to the statement B, which was an adjustment relied upon by the appellant in this suit going in on the ground that by the terms of the reference the umpire had no authority to receive it as piece of evidence and treat it as such. On the other hand he said he could not dispute the proposition of law urged by the plaintiff's solicitor. The result was that the respondent's solicitor not objecting, the statement B was put in. Further in examining his client respondent's solicitor put questions to him with reference to some of the adjustments: see p. 20, part 2 of the Paper Book; and respondent admitted having signed "another statement of account" besides B. The appellant's solicitor then produced another statement but in answer to his solicitor respondent could not say whether that was the other statement which he had signed. The statement

was then marked M. I for the identification and respondent was asked questions with reference to it. And it is this very statement which on 19th March was objected to by respondent's solicitor as outside the umpire's authority and jurisdiction when the appellant's solicitor tendered it in evidence as a mere admission. The objection came very late then and the previous conduct of the respondent at the inquiry is sufficient to show what meaning he in common with the plaintiff had attached to the term of the reference which is now in dispute. And if that meaning is admissible we should accept it in preference to the other which if acted upon makes all the proceedings held and the expenses incurred at the inquiry before the umpire, abortive.

But it has been urged for the respondent before us that the result of the admission in evidence of the adjustment A-18 was practically such as to give it the character and operation of an account stated, the very thing which the terms of the reference had prohibited, inasmuch as the moment the adjustment went in as a piece of evidence, it might be, the umpire was at liberty to consider it and hold that it shifted the onus of proof as to the item of Rs. 1,300, for which it was admitted or any other item in the said account, on to the respondent. That was so no doubt; but there was still an important difference between the character of the onus so shifted, had the account retained the aspect of an account stated, and the nature of the onus thrown on the respondent by the admission of the account as an ordinary piece of evidence. In the former case, the respondent could not have sought discovery and the right to go into the whole account without laying the foundation for his right thereto by proving fraud or misrepresentation. Or, if fraud and misrepresentation failed, he could have, in the event of any specific error in the account stated proved, only secured the right to surcharge and falsify but not the right to go into the general account. He could not have called upon the appellant to produce his books and discover his documents before removing the preliminary bar in his way in either case. But for the purposes of the reference that bar stood entirely

removed; when the account stated (A-18) went in, there was nothing to prevent him from at once calling for discovery and going into the general account, without regard to proof of fraud or misrepresentation or mistake concerning the account stated.

Had the parties intended to shut out the adjustments absolutely even as mere admissions, not having the operation of an account stated, they could have taken care to say so and ought to have said so in the submission in distinct terms and refrained from dubious language, which laid a trap, as it were, for the umpire and made it open to either party to repudiate the reference after all the labour and expense of arbitration had been undergone. If again, respondent felt that the umpire was exceeding his authority by misconstruing an important term of the reference, he could have sought the help of the Court and asked it to construe the term and facilitate the arbitration.

I think the circumstances of this case are such as to make applicable to it the observations of Alderson, J., in *Faviell Eastern Counties Ry. Co.* (6). There the claims referred to arbitration were "an action of debt." But the plaintiff claimed before the arbitrator a sum for extra expenses which could be recovered only as damages, not debt. The arbitrator, in spite of defendant's protest, received the evidence of the extra work, and gave an award in respect of it in plaintiff's favour. The Court declined to set aside the award and treat it as a nullity, and Alderson, J., one of the Judges who composed the Court, said: "When the defendants saw the arbitrator entertaining a question which he ought not to entertain, it was their duty to interpose and apply to a Judge for the purpose of being allowed to revoke the submission, which no doubt would have been granted, had it appeared by affidavit that the arbitrator intended to exceed his jurisdiction. The question as to the construction of the submission would then have been raised before the Judge; but instead of doing that, the defendants, though they find the arbitrator going on, do not interpose but make the question one for his determination and he

(6) [1848] 2 Ex. 354 = 6 D. & L. 51 = 17 L. J. Ex. 223 = 76 R. R. 615.

has determined it." Similar was the case here. The respondent's solicitor objected before the umpire that the account stated could not be looked at, whether as an adjustment or otherwise and that by admitting it the umpire would exceed his jurisdiction. But the solicitor did not seek the interposition of the Court for a proper construction of the term of the reference; he withdrew from the case; and allowed the inquiry to go on; and it was only when the award had been made that the respondent asked for the interposition of the Court to interfere and set aside the award as a nullity. I think it would be bad law and injustice if under the circumstances of the case and having regard to the language of the reference defining the umpire's jurisdiction, we were to hold that the award was void and the inquiry before the umpire was all infructuous.

On these grounds, I concur in holding that the appeal should be allowed and the order appealed from should be set aside with costs.

G.P./R.K.

Order set aside.

A. I. R. 1914 Bombay 281

SCOTT, C. J. AND BEAMAN, J.

Laxmandas Harakchand—Defendant—Appellant.

v.

Baban Bhikari—Plaintiff—Respondent.

First Appeal No. 166 of 1913, Decided on 7th August 1914, from decision of Addl. First Class Sub-Judge, Dhulia, in Civil Suit No. 943 of 1910.

(a) Dekkhan Agriculturists' Relief Act (1879), S. 15-D—Suit for account by mortgagor agriculturist can be filed under S. 15-D even before expiry of time for payment.

Under S. 15-D a suit for an account may be filed by a mortgagor-agriculturist even when the time named for payment has not yet expired under the mortgage, and he may have either a declaration of the amount due on the mortgage or he may combine a declaration of the amount due with a decree for redemption.

[P 282 C 1]

(b) Dekkhan Agriculturists' Relief Act (1879), S. 16—S. 16 enables mortgagor-agriculturist to sue for general account.

Section 16 enables mortgagor-agriculturist to sue for a general account of money dealing between him and the lender and for a bare declaration of the amount due without any relief being claimed.

[P 282 C 1]

(c) Dekkhan Agriculturists' Relief Act (1879), Ss. 15-D and 16—Relief by way of

redemption under S. 15-D cannot be imported with claim for account under S. 16.

Mortgagor agriculturist is not permitted to import the relief to which he is entitled by way of redemption under S. 15-D into his claim for an account under S. 16, and thus to get the benefit of surplus profits remaining in the hands of the mortgagee under the usufructuary mortgage.

[P 282 C 1, 2]

G. S. Rao—for Appellant.

P. B. Shingne—for Respondent.

Judgment.—The defendant in this suit has had dealings with the plaintiff for many years and has advanced money to him upon mortgage, and balances due on old accounts have been secured by the mortgage of property of the plaintiff. The mortgage-bonds outstanding at present are Exs. 63, 64 and 65, which do not all relate to the same property, Ex. 65 relating to property entirely different from that to which Exs. 63 and 64 relate. The last of these mortgage bonds was executed in December 1903. Further monetary dealings took place between the plaintiff and the defendant which are evidenced by promissory notes commencing with 1st August 1905. The defendant in 1909 and 1910 brought four suits in the Jalgaon Court upon promissory notes executed by the plaintiff subsequent to July 1905.

The plaintiff then instituted a suit for a general account under the Dekkhan Agriculturists' Relief Act, and for redemption of the mortgaged property, and upon his application the four suits filed in Jalgaon on promissory notes were transferred by the District Court, Khandesh, to the First Class Subordinate Judge in Dhulia. That Judge has now tried the plaintiff's suit for account and redemption, and in taking an account he has made up one general account of the mortgage transactions and the promissory note transactions. The mortgages, he finds, were satisfied by profits received by the defendant some time prior to April 1906. and he has taken the defendant as being in receipt of profits at the rate of Rs. 2,000 a year under his mortgages, which profits subsequent to the date of the satisfaction of the mortgage-debts he has applied in the account in reduction of the defendant's claim upon the promissory notes.

That manner of taking an account has been challenged in this appeal. It is contended on behalf of the defendant that every mortgage of separate pro-

party, even where the suit relates to more than one mortgage, must be the subject of separate account under S. 13, Dekkhan Agriculturists' Relief Act, and that under each separate mortgage the mortgagee is entitled to retain such surplus profits as he may have got before the date of the redemption suit or the date of the redemption decree, and as an authority for that contention the judgments of Sir Charles Sargent in *Janoji v. Janoji* (1) and *Ramachandra Baba Sathe v. Janardan Apaji* (2) are referred to. Now if those authorities apply here they are binding upon us. But it appears to me that the case may be decided in favour of the appellant upon a somewhat different ground.

The mortgagor's right to file a suit for an account and redemption rests upon the provisions of the Dekkhan Agriculturists' Relief Act, and that Act makes provision for two different classes of suits for account by agriculturists. Under S. 15-D a suit for an account may be filed by a mortgagor-agriculturist even where the time named for payment has not yet expired under the mortgage, and he may have either a declaration of the amount due on the mortgage or he may combine a declaration of the amount due with a decree for redemption. That is a section which relates purely and exclusively to mortgage transactions. Then there is another section, S. 16, which enables him to sue for a general account of money dealings between him and the lender, and that S. 16 enables him to sue for a bare declaration of the amount due without any relief being claimed. It says: "Any agriculturist may sue for an account of money lent or advanced . . . by a creditor and for a decree declaring the amount, if any, still payable." But naturally he does not require any further reliefs than that. The plaintiff does not wish to be authorized to pay if the payment is inconvenient to him, as soon as the amount due is ascertained. Therefore the two sections where accounts are contemplated stand on a different footing. The plaintiff here however has combined his claim for account of the mortgage transactions with his claim for an account of the moneys lent upon promissory notes, and

he has sought to import the relief to which he is entitled by way of redemption under S. 15-D into his claim for an account under S. 16, and thus to get the benefit of surplus profits remaining in the hands of the mortgagee under the usufructuary mortgage. This we do not think he is permitted to do by the provisions of the Act, and if it were necessary to go further, it would be sufficient to point out that the result would be contrary to the decisions of Sir Charles Sargent which I have already referred to.

We therefore cannot accept the account taken by the lower Court, and the decree must be set aside and the suit remanded for a fresh account, treating the mortgage account as entirely separate from the promissory note account, so that the lender-mortgagee will not be accountable for surplus profits received by him after the date when it has been found that the mortgage-claims were satisfied.

The other point relating to the account which was argued on behalf of the appellant related to the amount of profits with which the mortgagee has been charged, namely, Rs. 2,000 per annum. We do not think that we should interfere with the decision of the lower Court upon that point which was come to after careful consideration of all the evidence, for we are not satisfied that the lower Court was wrong.

As the learned pleaders for the parties do not wish the mortgage-account to be reopened or to be taken again, we remand the case simply in order that the promissory note account may be taken separate from the mortgage account. The plaintiff will be entitled to take back his mortgaged property on the footing of the mortgages having been discharged, and the suits on promissory notes will be dealt with by the lower Court in accordance with the result of the promissory note account upon the basis indicated in this judgment.

The defendant must pay half the costs in the lower Court and have his costs of this appeal. One set of costs to be set off against the other. The rest of the costs of the suit on remand to be dealt with by the lower Court.

G.P./R.K.

Case remanded.

(1) [1893] 7 Bom. 185.

(2) [1890] 14 Bom. 19.

A. I. R. 1914 Bombay 283

SCOTT, C. J., AND BEAMAN, J.

Girdharilal Prayagdat Vajpe—Defendant—Appellant.

v.

Manikamma Narayansami and another—Plaintiffs—Respondents.

Second Appeals Nos. 532 and 830 of 1912, Decided on 4th July 1913, from the decision of the Asst. Judge, Dharwar, in Appeal No. 71 of 1911.

Fraud—*A* mortgaging property to *B* to protect it from creditor *C*—Mortgage consideration received but repaid to *B*—*C* attaching property—*B*'s claim on mortgage to release from attachment admitted by *A*—Property ordered to be sold subject to mortgage but not sold as *C* was paid off by *A* who remained in possession—*B* sued *A* to recover dues on mortgage—Plea of non-receipt of consideration and that mortgage was void, held to be good plea.

A mortgaged his property to *B*, in order to protect it from a creditor of his, *C*. The consideration of the deed of mortgage was received by *A* in the registration office, but was repaid to *B* outside the office. The property was attached by *C*. *B* made a claim on the basis of the mortgage deed for the release of the property from attachment. *A* admitted the claim and the Court ordered that the property should be sold subject to the mortgage. The property was not, however, sold as *A* paid off *C* before the order for the sale was carried into effect.

A remained in possession of the property. Subsequently *B* sued *A* for recovery of the amount due on the mortgage.

Held: that as the fraud on *C* was not actually effectuated and as *B* was invoking the aid of Court to enforce the executory contract, *A* could plead that he had received no consideration and that the mortgage was void : 31 Bom. 405, Dist.; 13 M. L. A. 551, Rel. on.

[P 284 C 1]

S. V. Palekar—for Appellant.*V. V. Bhadkamkar* and *K. H. Kelkar*—for Respondents.

Scott, C. J.—These appeals are preferred in two suits filed by different plaintiffs in the Court of the Subordinate Judge at Dharwar on 23rd October 1909. In the first suit, the plaintiff sued to recover the amount due upon a mortgage dated 31st March 1882, the mortgage having been executed by the defendant in favour of the plaintiff's husband. In the second suit the plaintiff sued to recover the amount due on a mortgage of 31st July 1885 the mortgage having been executed by the defendant in favour of the plaintiff's father. The defendant in each case is in possession of the mortgaged property and in each case the defence is the

same, namely, that the mortgage deed was passed in order to protect the property from the defendant's creditor, Rajesaheb. The defendant in his evidence stated that the considerations for the two deeds were received in the Registration Office and repaid to the mortgagees outside the office. The properties were attached by the creditor Rajesaheb and the mortgagees then made claims on the basis of the deeds for release of the property from attachment. The mortgagor admitted the claims and the Court ordered that the property should be sold subject to the mortgages above mentioned. The properties were however not sold because the defendant paid off the creditor Rajesabeb before the orders for the sale were carried into effect.

The learned Judges in the lower Courts have held that the case of the defendant is on all fours with that of the defendant in *Sidlingappa v. Hirasa* (1) and, therefore, he cannot be allowed to defeat the plaintiff's claim by pleading his own fraud. The most obvious distinction between the present case and that relied upon by the learned Judges is that the creditor, Rajesaheb, has not been defrauded as observed in Mayne's Hindu Law, para 446 : "If he (the transferor) has not defrauded anyone, there can be no reason why the Court should punish his intention by giving his estate away to *B*., whose roguery is even more complicated than his own." There is another distinction also between the present case and *Sidlingappa's* case (1) and that is, that the plaintiffs in each of these cases is seeking to enforce his contract for payment of money under his mortgage-deed and that point of distinction was referred to by Sir Lawrence Jenkins in *Sidlingappa's* case (1), where he said : "The defendant is not resisting the enforcement of a contract, but is invoking the aid of the Court to enable him to escape on the strength of his own fraud from the consequences of sale deeds which ostensibly create a valid title in the plaintiff." It is to be observed that the authorities relied upon in that case were authorities which were not concerned with the relations of mortgagor and mortgagee. Where those relations exist the considerations stated in the

(1) [1907] 31 Bom. 405=9 Bom. L. R. 542.

judgment of the Privy Council in *Ram Saran Singh v. Mt. Pran Peary* (2), must apply subject to the dominant principle that where the fraud has actually been carried into effect the estate must lie where it falls. We, therefore set aside the decrees of the lower Courts and remand the cases for decision on the merits.

Costs, costs in the cause.

Beaman, J.—As I was a party to the judgment in *Sidlingappa v. Hirasa* (1), I may be allowed to add that while still fully adhering to the principle of that judgment, I do not think that within the proper limits of its application it need be brought in question here. I agree with my Lord, the Chief Justice, that this case can be distinguished. Here the claim appears to lie in contract and in contract still executory so that it is difficult to see how if the contract be in reality illegal it could be enforced at all in the plaintiff's favour, or why, if not illegal the defendant should not be allowed in ordinary course to show that he received no consideration. But I think that a still broader ground of distinction is that in this case as found by the Courts below no fraud was actually effectuated and that is really the basis of the decision as I understood it at the time given by Jenkins, C. J., in *Sidlingappa's* case (1). Upon all the other points of distinction set forth in my Lord the Chief Justice's judgment just delivered, I entirely agree.

G.P./R.K.

Decree set aside.

(2) [1869-70] M. I. A. 551=15 W. R. 14=20 E. R. 656 (P. C.).

A. I. R. 1914 Bombay 284

BACHELOR AND SHAH, JJ.

Daya Khushal—Appellant.

v.

Assistant Collector, Surat—Respondent.

Second Appeal No. 194 of 1912, Decided on 23rd July 1913, from decision of Dist. Judge, Surat, in Reference No. 10 of 1911.

Land Acquisition Act (1894), S. 23.—Fact that land to be acquired has adventitious value and that persons wishing to purchase it would give higher price will be considered by Court assessing compensation.

Under the Land Acquisition Act, if the land to be acquired has an adventitious value, that is something beyond the mere agricul-

tural or normal value and that is a marketable value in this sense, that persons wishing, for a purpose for which the land is peculiarly applicable, to purchase it would give a higher price than the Court assessing compensation has a fair right to take that fact into consideration. [P 285 C 2]

In awarding compensation for land to be acquired for the purpose of quarrying, the special adaptability of the land for the purpose is a matter which ought to be considered. [P 285 C 2]

C. K. Parakh—for Appellant.

S. S. Patkar—for the Crown.

Judgment.—This is an appeal from an award by the learned District Judge of Surat under the Land Acquisition Act. Two acres and thirty gunthas of land belonging to the appellants have been acquired by Government for the Bombay Baroda and Central India Railway, and it is important to note that the land has been acquired for the purpose of quarrying.

The short point involved in the appeal is, whether the special adaptability of the land for quarrying is a matter to be excluded from consideration or not. The learned Judge below was of opinion that it should be excluded because the appellants had never obtained from the Government permission to quarry, and under S. 65 of the Land Revenue Code, the right of Government to mines and mineral products in land such as this is expressly reserved.

Now, to begin with the appellants are entitled to claim that the compensation should be awarded to them on the footing that the "value of the land is determined, not necessarily according to its present disposition, but laid out to its most lucrative and advantageous way in which the owner can dispose of it": see *In the matter of the Land Acquisition Act of 1870 Munji Khetsey* (1). It is quite true that under section 65 of the Land Revenue Code, the appellants are not entitled as of right to work the minerals in their land. That circumstance, however, is not decisive of the question as to the market-value of the land. For, under R. 39 of the rules framed under S. 214 of the Land Revenue Code, it is provided that "the Collector may, at his discretion, sell by public auction, or otherwise dispose of, the right to remove stone or any other material

(1) [1891] 15 Bom. 279.

which is the property of Government for such purposes, in such quantities and on such terms as he thinks fit." By this rule the Collector is empowered, if he so chooses, by private treaty with the appellants to authorize them to quarry in this land. It is admitted before us that in actual practice, it is common for the occupants of such lands to obtain the Collector's permission to quarry on the payment of certain fees, and this admission receives countenance from the circumstance that a special scale of fees has been sanctioned for the removal of stone and other materials from the soil. So far, therefore, the appellants appear to be in no worse case than would be the owners of agricultural land for which, on its acquisition, the claim is made that the market-value should be estimated on the footing of its building site value, because in the case of agricultural land its conversion into a building site equally requires the permission of Government and is equally subject to the levy of certain fees. Yet in *Bhujabalappa v. Collector of Dharwar* (2), it was held that certain land, though technically agricultural land, was rightly valued on the basis of its being suitable for building purposes by reason of its proximity to a large town. The case therefore appears to us to fall within the principle which was laid down by the Court of Appeal in England in *In re Lucas and Chesterfield Gas and Water Board* (3). That was a case where the land was acquired for the purpose of making a reservoir. The land had a special adaptability for the construction of a reservoir, and it was laid down that the tribunal assessing the compensation ought to include in its consideration this special adaptability as an element of value and that the consideration of this element was not to be excluded merely by reason of the fact that the land could not be actually used for the reservoir unless statutory powers for its compulsory purchase were first obtained. In delivering judgment, Lord Justice Vaughan Williams quoted what was said by Mr. Justice Grove in *In*

re Countess Ossalinsky and Manchester Corporation (4), to the following effect:—"If the land has what I may call an adventitious value, that is, something beyond its mere agricultural or normal value, and that is a marketable value in this sense, that persons wishing, for a purpose for which the land is peculiarly applicable, to purchase that land would give a higher price for that land, then the arbitrator has a fair right to take that into consideration; it is a matter, no doubt contingent, but still it is a matter which is not to be ignored or put out of consideration by an arbitrator." So, here, it seems to us that the special adaptability of this land for quarrying is a matter which ought to be considered. In the result, it may or may not be that the market-value of the land will be held to be enhanced owing to the special adaptability. But the question is one which, we think, ought to be included in, and not excluded from, consideration. What the Court has to determine is the market-value of this land, and it may be that a willing purchaser would increase the price otherwise payable for the land by reason of its adaptability for use as a quarry, and that the price so offered would still be an increase on the ordinary agricultural price notwithstanding that the purchaser had to allow deduction on account, first, of the risk of not obtaining the Collector's permission under R. 39, and, secondly, of the fees which would be payable to the Collector in the event of permission being had. But the matter is one which, as we say, ought, in our opinion, to be considered, and since the learned Judge below has declined to consider it, we must now reverse his award and remand the case to him in order that he may decide it afresh in the light of the foregoing observations.

It will be open to either party to adduce fresh evidence with a view to throwing light on the question what is the market-value of this land considered as a parcel of land with special adaptability for use as a quarry.

(4) Not reported. Decided in 1883 in the Queen's Bench Division by Grove and Stephen, JJ. The judgment of the Court is not set out at length in *Browne and Allen's Law of Compensation*, Edn. 2, p. 659.

(2) [1899] 1 Bom. L. R. 454.

(3) [1909] 1 K. B. 16=77 L. J. K. B. 1009=99 L. T. 767=72 J. P. 437=6 L. G. R. 1106=24 T. L. R. 858.

Costs will be costs in the reference.

We note for possible future guidance that the question as to the land's adaptability as a quarry, which we have discussed above, is the only question urged on behalf of the appellants.

G.P./R.K.

Award reversed.

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A. I. R. 1914 Bombay 286

SCOTT, C. J., AND BATCHELOR, J.

R. D. Sethna—Defendant—Appellant,
v.

Grace Edith Hemmingway—Plaintiff
—Respondent.

Original Civil Appeal No. 62 of 1913, and Civil Suit No. 699 of 1913, Decided on 31st March 1914.

(a) Transfer of Property Act (4 of 1882), S. 130—Deposit receipt is not negotiable instrument passing by delivery or endorsement—If money is immediately payable and receipt duly endorsed is presented with order to pay individual, that individual becomes owner of money.

A deposit receipt is not a negotiable instrument which passes either by delivery or by endorsement but where the money mentioned in the receipt is immediately payable and the receipt is presented duly endorsed together with an order to pay a given individual, the individual becomes the owner of the money upon payment by the banker or his promise to hold it at the disposal of the payee. [P 287 C 2]

(b) Transfer of Property Act (4 of 1882), S. 130—*W's* fixed deposit of Rs. 10,500 falling due—Receipt duly endorsed sent with letter to bank asking to hand over amount to defendant—Defendant deposited Rs. 10,000 in his name and drew the rest—*W's* heir sued for declaration that Rs. 10,000 formed part of *W's* estate—Defendant held to be absolute owner of the money and there was no resulting trust in favour of *W's* heir—Trusts Act, S. 81.

Where *W* who had a fixed deposit of Rs. 10,500 falling due on 7th August 1912 sent on that date the receipt duly endorsed with a letter to the bank asking them to hand over the amount to his nephew (the defendant) and the defendant drew the interest and Rs. 500 out of the principal and deposited the balance of Rs. 10,000 in his own name, on a suit by the heirs of *W* on his death for a declaration that the amount of Rs. 10,000 formed part of *W's* estate :

Held : (1) That the plaint was defective as it did not show that the plaintiff had obtained letters of administration and should on that account have been rejected on presentation ;

(2) that the defendant became the absolute owner of the money secured by the existing receipt;

(3) that there was no resulting trust in favour of the plaintiff. [P 288 C 1]

Binning and Short—for Appellant.

Inverarity, Strangman and Raikes—for Respondent.

Judgment.—The undisputed facts are that one Mr. Wakeford, who was in receipt of a Government pension of Rs. 54 per mensem, had a deposit of Rs. 10,500 with the Hongkong and Shanghai Bank under a deposit receipt of 7th August 1911. which fell due on 7th August 1912. On 26th June 1912 he wrote to the bank saying the receipt had been stolen and asking for a duplicate receipt. He visited the bank soon after and was given a form for an indemnity to the bank on the issue of a fresh receipt. He then told the bank clerk, Sunderrao, that he wanted a duplicate and wanted to give the money to his nephew, the defendant Harrison, who had accompanied him to the bank. The defendant came to the bank again on 7th August with deposit receipt, which had been found duly endorsed and a letter from Wakeford, but upon being told he would have to be identified by Wakeford took away the deposit receipt and the letter. He returned the following day with the deposit receipt bearing Wakeford's endorsement, dated 7th August, and also with a letter in the following terms :

"Bombay, 8th August 1912.

THE AGENT,

Hongkong and Shanghai Banking Corporation.

SIR,

I hereby state that I have found my bank receipt. Herewith I am forwarding the same for the interest now due. I wish it to be handed over to my nephew.

I also wish you to hand over the amount of Rs. 10,500 which is in fixed deposit to my nephew, Wilmot Charles Harrison, to his account.

Yours truly,

(Sd.) C. A. WAKEFORD.

This is my nephew's signature:

(Sd.) W. C. HARRISON.

(Sd.) C. A. WAKEFORD."

The defendant asked for a new deposit receipt for Rs. 10,000 and the Bank issued a receipt for that sum in the defendant's name and paid him the interest due on the former receipt and Rs. 500 at the balance of the principal.

Wakeford died on 18th October 1912 at the age of 84 unmarried and leaving him surviving as his next-of-kin ten grand-nephews and nieces, viz., two sons and two daughters of his prede-

ceased niece, Jane Williams, and three sons and three daughters of his predeceased nephew, Edmund Harrison. Two days before the due date for payment by the bank of the sum of Rs. 10,000 secured by the deposit receipt in favour of the defendant, one of the daughters of Jane Williams filed this suit claiming a declaration that she as administratrix of Wakeford was entitled to the said sum of Rs. 10,000 as part of his estate.

The plaint was defective in that it did not show that the plaintiff had obtained letters of administration and it should on that account have been rejected on presentation. The plaintiff, however, obtained letters of administration on 31st October 1913, a fortnight before the hearing, and the hearing was allowed to proceed. A decree was passed for the plaintiff declaring that the Rs 10,000 in question formed part of the estate of the deceased and that the plaintiff was entitled to the same. This was not contrary to S. 190, Succession Act as remarked by the learned Judge. The only tenable technical objection was to the institution of the suit before the plaintiff had an existing interest in the subject-matter. That point, however, if it had been taken and had resulted in the rejection of the suit at the hearing, would have only led to a waste of time and costs without benefiting the defendant, for a fresh suit would immediately have been brought by the administratrix. The course which the trial eventually took was determined by a ruling of the learned Judge that the endorsement of the receipt by the deceased was not evidence of a gift and that the onus was on the defendant to show how what was the only property of the deceased in August came to be given to him and that if he proved facts from which the Court could deduce that there was a good gift, the plaintiff would then have to prove circumstances showing the gift was invalid. On the evidence the learned Judge was satisfied that the deceased was anxious that the defendant should have the benefit of the money deposited with the Bank, but did not think that he intended that the defendant should be able to make away with the money in the donor's lifetime or draw the interest without making

due provision for the donor's maintenance, but he held that there was no effective transfer, having regard to S. 130, T. P. Act, of the debt due by the bank to the deceased and that, if there was, there would be a resulting trust for the legal representatives of the deceased under S. 81, Trusts Act.

We are unable to concur in the learned Judge's conclusion as to the effect of the transaction of 8th August. It is established by a preponderance of English authorities that a deposit receipt is not a negotiable instrument which passes either by delivery or by endorsement, but where the money mentioned in the receipt is immediately payable and the receipt is presented duly indorsed together with an order to pay a given individual, that individual becomes the owner of the money upon payment by the banker or his promise to hold it at the disposal of the payee. The question is discussed by Buckley, J., in *In re, Beaumont; Beaumont v. Ewbank* (1) where he says :

"In all the cases, in order that the gift may be valid, it must, I think, be shown that the donor handed over either property, or the indicia of title to property, which belonged to him. His own cheque is not property, it is only a revocable order such that if the banker acts on it, the donee will have the money to which it relates. Even without actual payment of the cheque there may be a good gift, for instance if there is undertaking by the banker to the donee to hold the amount of the cheque for the latter, that may be enough. Unless there is that or something equivalent to it there is no delivery of property but only a delivery of that which if acted on will procure the delivery of property."

An order on a banker to pay money which he holds to the credit of the customer, is not an assignment of a debt but an authority to deliver property, which if acted on is equivalent to delivery by the customer. Here the letter of 8th August is such an order and it has been acted on. It may be that if objection had been taken at the hearing it would have been rejected for want of a stamp. That however is not an objection which can be effective in

(1) [1902] 1 Ch. 869 at p. 294=71 L. J. Ch. 478=86 L. T. 410=50 W. R. 38.

appeal now that the letter is on the record : see S. 36, Stamp Act.

The defendant is therefore the owner of the money secured by the existing receipt and the plaintiff cannot succeed, unless she shows that he holds it in trust for the donor or his representatives. In our opinion the finding of the learned Judge as to the intention of the donor which is as favourable to the plaintiff as the evidence permits, negatives the idea of any resulting trust. Upon that finding this is a much stronger case in favour of the donee than *Standing v. Bowring* (2). The plaintiff in that case being 86 years of age and being possessed of consols to the amount of £6,000 transferred them into the names of herself and her godson. It was proved that she was aware when she did this that she would be able during her lifetime to receive the dividends and that if her godson survived her he would become entitled as survivor. Lindley, L. J., remarked at p. 289 :

"The plaintiff in her statement of claim and in the Court below rested her case on equitable grounds, and sought to establish a trust in her favour. But the only trust which was consistent with the evidence was a trust to pay her the income of the consols for the joint lives of herself and the defendant. This trust was not in controversy, but is not sufficient for the plaintiff's purpose. No trust will suffice short of an absolute trust for herself. But it is impossible to impose such a trust on the defendant, when the evidence conclusively shows that she never intended to create any trust of the kind. Trusts are neither created nor implied by law to defeat the intentions of donors or settlors; they are created or implied or are held to result in favour of donors or settlors in order to carry out and give effect to their true intentions, expressed or implied."

The gift in this case was an absolute gift to the donee with the expectation that he would look after the donor till the latter's death. In our opinion the evidence shows, though this is not essential to the defendant's success, that the defendant acted up to the donor's expectations. According to Ex. 10 (a

letter of the deceased to the plaintiff in June 1911) the donor paid his rent out of the interest he then received from the bank and presumably paid his other expenses from his monthly pension of Rs. 54. In the month following the gift the defendant took the donor to live with him and thus became responsible for his lodging.

The learned Judge at one period of the case thought that the fact that an old man of debilitated health gave all his savings to the one among his nephews and nieces who had taken charge of him raised a presumption of undue influence. We are not prepared to assent to this and the evidence shows that a coolness had arisen between the old man and the plaintiff, whom along with her sister he had at one time intended to benefit by will. In our opinion the evidence establishes that the donor was perfectly sensible and competent at the time of the gift, and the charge that the defendant exercised undue influence fails. We reverse the decree of the lower Court and dismiss the suit with costs throughout.

G.P./R.K.

Decree reversed.

A. I. R. 1914 Bombay 288

HEATON AND SHAH, JJ.

Bachraj Nyahalchand Marwadi—Defendant—Appellant.

v.

Babaji Tukaram Avati—Plaintiff—Respondent.

Second Appeal No. 895 of 1912, Decided on 5th August 1913, from decision of Dist. Judge, Ahmednagar, in Appeal No. 20 of 1911.

Limitation Act (1908), S. 19—Decree obtained in 1900 requiring payment of annual instalments—On failure of any of two redemption right was to be foreclosed for ever and defendant was to take possession of suit lands—Instalments fully paid in 1902 and a part instalment for 1903—Application made in 1905 by mortgagor for certifying payments made and consented to by defendant—Application for foreclosure in 1907 dismissed—Defendant made present application for foreclosure in terms of decree in 1909—Application of 1909 held to contain acknowledgment within S. 19, and could be called step-in-aid of execution and that the application of 1909 was within time—Limitation Act, Art. 181.

On 3rd July 1900 the plaintiff obtained a decree whereby he was required to pay by annual instalments and to redeem the mortgaged property, and in case of his failure to pay any

(2): [1885], 31 Ch. D. 282=55 L. J. Ch. 218=54 L. T. 19=34 W. R. 204.

two instalments his right to redeem was to be for ever foreclosed and then the said lands were to be taken by the defendant into his possession from that of the plaintiff. Plaintiff paid two instalments in full for 1902 and one instalment in part of the year 1903. Nothing was paid thereafter. An application was made on 20th July 1905, to the Court certifying these payments in satisfaction of the decree being referred to therein as an outstanding decree, and the payments being mentioned as payments made on account of the decree. The application was signed by the plaintiff and was consented to by the defendant. On 14th December 1907 an application for foreclosure was made, but it was dismissed for want of prosecution. The present application for an order of foreclosure in terms of the decree was made by the defendant on 20th March 1909 :

Held: (1) that assuming the application seeking foreclosure to be subject to the same rules of limitation which governed an ordinary application for execution, the two previous applications of July 1905 and December 1907 were sufficient to save the application of March 1909 ; [P 289 C 2]

(2) that having regard to the terms in which the decree was referred to in the application of July 1905, the application of 1905 clearly contained an acknowledgment within the meaning of S. 19 ; [P 290 C 1]

(3) that having regard to the form and purpose of the application of 1905, and having regard to the fact that it was consented to by the defendant, it must be regarded as a step-in-aid of execution ; [P 290 C 1]

(4) that the application of 1909 was within time. [P 290 C 1]

P. D. Bhide—for Appellant.

P. B. Shingne—for Respondent.

Judgment.—The facts which give rise to this appeal are as follows :

On 3rd July 1900, the plaintiff obtained a decree in the terms of an award, whereby he was required to pay a sum of Rs. 600 by annual instalments of Rs. 50 and to redeem the mortgaged property. It was further provided in the decree that "if the plaintiff failed to pay any two instalments to the defendant in time, his right to redeem the mortgaged lands should for ever be foreclosed and then the said lands should be taken by the defendant into his possession from that of the plaintiff. Till then, the lands should be allowed to remain in the possession of the plaintiff himself." Subsequent to this decree, two instalments in full for 1902 and one instalment in part for the year 1903, were paid by the plaintiff to the defendant. No other instalment was paid thereafter. An application was made, on 20th July 1905, to the Court for certifying those payments in satisfaction of the decree. This application was

signed by the plaintiff and was consented to by the defendant. On 14th December 1907, an application was made by the defendant for an order of foreclosure in terms of the decree; but that application was dismissed, because no steps to prosecute the same were taken. The present application was made on 29th March 1909. The defendant by this application seeks to have an order of foreclosure in the terms of the decree.

The plaintiff raised objections to this application and urged that the application was barred by limitation. Both the lower Courts have found in favour of the plaintiff and held that the application is barred by time.

The defendant has preferred the present second appeal, and has urged in support thereof that the lower Courts have wrongly decided the question of limitation. It is contended that the present application for an order for foreclosure is really an application under S. 93, T. P. Act, and that there is no period of limitation applicable to such an application. It is further urged that even assuming that there is a period of limitation to which this application is subject, still having regard to the application of 20th July 1905 and to the previous darkhast of December 1907, the present application is in time.

With regard to the first point, we express no opinion in this appeal. Having regard to the view which we take of the second contention urged on behalf of the appellant, it is unnecessary to come to a definite conclusion on the first point.

Assuming that the application under S. 93, T. P. Act, or rather the application seeking foreclosure, is subject to the same rules of limitation, which govern an ordinary application for execution, we are clearly of opinion that in the present case, the two previous applications, which we have already referred to, are sufficient to save the present application. The determination of this question depends upon the construction which is to be placed upon the application of 20th July 1905. Both the lower Courts have found that this application is not an acknowledgment. It is urged here that having regard to the terms of the application, it amounts to an acknowledgment within the meaning of S. 19, Lim. Act. Having regard

to the terms in which the decree is referred to in this application by the plaintiff, we think that it clearly contains an acknowledgment within the meaning of S. 19. The decree, as we read the application, is referred to therein as an outstanding decree, and the payments mentioned in the application are mentioned as payments made on account of the decree.

It was also urged on behalf of the appellant that this was an application for a step-in-aid of execution and as such was sufficient to save limitation. Having regard to the form and purpose of the application and having regard to the fact that it is consented to by the defendant, we think that it must be treated in effect as a joint application by the plaintiff and the defendant for the purpose of having the payments duly certified. We take the same view of this application and of the effect thereof as was taken of a somewhat similar application in the case of *Wasi Imam v. Poonit Singh* (1). In either view of this application, it is clear that it is sufficient to give a fresh starting point for limitation. The subsequent application of December 1907 was made within three years from this date, and the present application is made within three years from the date of the preceding application. The trial Court has referred to certain circumstances as showing that the application of July 1905, (Ex. 19) loses much of its evidential value. The appellate Court has not gone into this question. But after considering these circumstances, we see no reason to think that the application was not duly made by the plaintiff and that he is not responsible for the contents thereof. In fact, the learned pleader for the respondent fairly conceded that he could not support the view taken by the trial Court on this point.

We therefore come to the conclusion that the present application is not time-barred.

The result therefore is that this appeal is allowed, the order of the lower Court set aside and the case sent back to be dealt with according to law. The appellant to have his costs throughout.

G.P./R.K.

Appeal allowed.

A. I. R. 1914 Bombay 290

SCOTT, C. J., AND CHANDAVARKAR, J.

S. Amarchand & Co. and another—Appellants.

v.

Ramdas V. Durbar—Respondent.

Original Civil Jurisdiction Appeals Nos. 4 and 7 of 1912, Decided on 21st March 1913.

(a) Contract Act, (1872), Ss. 103 and 61—Endorsee of railway receipt from C who purchased goods from R of Bagalkote—Goods to be carried from Bagalkote to Bombay—Goods under receipt received for mixed transit by sea and land—Advance to C declined until receipt was endorsed as security—C becoming insolvent—R as unpaid vendor stopped goods in transit—Appellant sued to recover advance upon railway receipt—The railway receipt being assignable by endorsement, held to be instrument of title to goods under S. 103.

The appellant was an endorsee of a railway receipt from C who purchased the goods mentioned in the receipt from R of Bagalkote. The goods were to be carried from Bagalkote to Bombay via Marmagoa and the railway receipt was a document under which the goods were received for a mixed transit by land and sea. The appellant had declined to advance to C the sum claimed until the railway receipt was endorsed as security as a large sum was already due on the account. C having become insolvent, R, as unpaid vendor stopped the goods in the hands of the Steam Navigation Company conveying the said goods from Marmagoa to Bombay. The appellant sought to recover the advance specifically upon the railway receipt.

Held: (1) that although the advance was entered in the general account of C, the endorsing of the railway receipt as security induced the advance and that the advance was, therefore, made specifically upon them.

(2) that the railway receipt being assignable by endorsement under the conditions printed on the back thereof, was an instrument of title to the goods under S. 103. [P 292 C 2]

(b) Contract Act (1872), S. 61—S. 61 applies if there is no intention inconsistent with its application.

The application of the rule in S. 61 is always subject to the condition that the parties have indicated an intention inconsistent with its application. [P 291 C 1, 2]

(c) Transfer of Property Act (1882), Ss. 137 and 4—S. 137 is part of Contract Act.

Section 137 is under S. 4 to be taken as part of the Contract Act. [P 292 C 2]

Mulla, Setalvad and Desai—for Appellants.

Strangman, Jinnah and Bahadurji—for Respondent.

Judgment.—In both these appeals, the appellant is an endorsee of a railway receipt from the firm of Chhaganlal Kalidas who purchased the cotton bales

mentioned in the receipt from Ramdas Vithaldas of Bagalkote.

Chhaganlal-Kalidas having become insolvent, Ramdas Vithaldas, as unpaid vendor, stopped the cotton in the hands of the Bombay Steam Navigation Company before it had been delivered to the respective endorsees. In each case, the Steamship Company has interpleaded. The first question in each case is whether the endorsee made the advance which he seeks to recover specifically upon the railway receipt or receipts.

In Appeal No. 7, the fact of such advance is not disputed but in Appeal No. 4 it is contended that the advance of Rs. 15,000 was not made specifically against the two railway receipts for 135 bales because the advance is entered in the general account of Chhaganlal and the proceeds in ordinary course would have been held as security not only for the advance of Rs. 15,000 but also for any general balance of account. But it is quite clear from the evidence that the appellant declined to advance the Rs. 15,000 until the railway receipts were endorsed as security as a large sum was already due on the account. We cannot doubt that the endorsing of the railway receipts as security was what induced the advance and that the advance was therefore made specifically upon them.

It is not disputed that in each case under appeal the advance was made in good faith.

In Appeal No. 4, it is further contended that the advance has been repaid before decree.

The facts are that on 15th August 1911, i. e., simultaneously with the Steamship Company's interpleader suit, the appellants filed a suit against the respondent Ramdas Vithaldas and also against the endorser to recover the Rs. 15,000 advanced against the railway receipts. Some months later, the entries in the general account of Chhaganlal in the appellant's books show that various sums were credited to the latter which, if the rule in *Clayton's* case (1) and the rule of S. 61, Contract Act were applied, would extinguish the debt of Rs. 15,000; but the application of the rule is always subject to the condition that the parties have indicated no

intention inconsistent with its application.

It is clear from the appellant's suit that he intended to enforce his claim for the Rs. 15,000 against the proceeds of the 135 bales of cotton covered by the railway receipts in question. This is sufficient indication of intention to negative the application of the rule.

It was further suggested that the rule in *In the matter of Westzinthus* (2) should be applied by marshalling any surplus assets in favour of the unpaid vendor, Ramdas, in the event of the question as to the applicability of S. 103, Contract Act, being decided against him. But the simple answer is that there are no surplus assets.

The question common to both appeals remains to be dealt with: Are the railway receipts instruments of title within the meaning of S. 103?

The railway receipts are issued by the M. and S. M. Ry. Co. in the following form:

The M. and S. M. Ry. Co. Ltd.
Receipt.

From Bagalkote to Bombay H. R. on B. S. N. Ry. via M. R. H.

Sender's name, Ramdas Vithaldas.
To whom consigned, Chhaganlal-Kalidas.

Then follows a tabular statement of particulars relating to the goods, below which it is stated—"These goods are accepted for conveyance subject to the conditions printed on the back herein."

Condition 3 is as follows:—

"That the railway receipt given by the railway company, for the articles delivered for conveyance must be given up at destination by the consignee to the railway company or the railway company may refuse to deliver and that the signature of the consignee or his agent in the delivery book at destination shall be evidence of complete delivery.

If the consignee does not himself attend to take delivery, he must endorse on the receipt a request for delivery to the person to whom he wishes it made and if the receipt is not produced, the delivery of the goods may at the discretion of the railway company be withheld until the person entitled in its

(1) [1861] 1 Mer. 572 = 15 R. R. 161 = 35 E. R. 781.

(2) [1838] 5 B. & Ad. 817 = 2 N. & M. 644 = 3 L. J. (n. s.) K. B. 56 = 39 R. R. 665 = 110 E. R. 992.

opinion to receive them has given an indemnity to the satisfaction of the railway company."

Condition 9 provides that the goods should be subject to the rules and conditions printed in the railway company's Goods Tariff and to the rules and regulations and wharfage and other charges in force on such railways and shipping lines over which they might be conveyed.

The holders of the railway receipts in each case presented them not to the railway company which issued them but to the Bombay Steam Navigation Company which was the shipping line by which the goods were conveyed during the last part of the transit, i. e., from Marmagoa to Bombay. The railway receipt was a document under which the goods were received for a mixed transit by land and sea. There can be no doubt that in America such a document would be treated as, and probably called, a bill of lading: see *St. Louis, Iron Mountain and Southern Railway Co. v. Knight* (3), where the Court after stating the nature and effect of a bill of lading, said: "The doctrine is applicable to transportations made by railway companies and other carriers by land as well as carriers by sea." This point was taken by Mr. Robertson in the lower Court but the Judge said: "The document is a railway receipt and cannot become a bill of lading because the railway companies employed the Bombay Steam Navigation Company to carry the goods for part of the distance." I understand that the learned Judge meant only that the document would not be a bill of lading within the meaning of S. 103, Contract Act, so that its assignment to a pledgee would defeat the unpaid vendor's right of stoppage in transit. But according to S. 103 it is not only a bill of lading but any other instrument of title to goods which may be assigned with the same effect as results from the assignment of a bill of lading, and it is material to remember that the transit from Bagalkote to Bombay via Marmagoa is a transit identical in its nature for part of distance with the transit of goods shipped by a consignor in Marmagoa under a bill of lading for delivery in Bombay; and I think that

for this reason, on the special facts of these cases, the railway receipt, if assignable by endorsement, would be an instrument of title to the goods under S. 103, Contract Act. It is true that in *G. I. P. Ry. Co. v. Hanmandas Ramkison* (4), it has been held, a railway receipt transferable by endorsement by the terms of the contract was not an instrument of title within the meaning of S. 103. That was a case of conveyance by land from Bijapur to Bombay and in that respect the element of voyage by sea under a combined receipt and contract issued by the carrier was absent. It is also important to note that since the date of that decision, the chapter of the Transfer of Property Act relating to the assignment of contractual claims has been recast and is now applicable to the Bombay Presidency. By S. 137, it is provided that—

"Nothing in the foregoing section of this chapter applies to stocks, shares or debentures, or to instruments which are for the time being, by law or custom, negotiable or to any mercantile document of title to goods.

"*Explanation.*—The expression 'mercantile document of title to goods' includes a bill of lading, dock-warrant, warehouse keeper's certificate, railway receipt, warrant or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorizing or purporting to authorize, either by endorsement or by delivery, the possessor of the document to transfer or receive the goods thereby represented."

This is one of the sections of the Transfer of Property Act relating to contracts which under S. 4 is to be taken as part of the Contract Act. We have therefore an express statement by the legislature that railway receipts shall be taken to be mercantile documents of title fulfilling one or other of the two specified conditions, viz., proving in the ordinary course of business the possession or control of goods, or authorizing or purporting to authorize either by endorsement or by delivery the possessor of the document to transfer or receive the goods thereby represented. Under condition 3 of railway receipts in

(3) [1887] 112 U. S. 79=30 Law. Ed. 1077.

(4) [1890] 14 Bom. 57.

these cases, it is clear that the documents fall under the latter class. The significance of the division into two classes of mercantile documents of title mentioned in S. 137, T. P. Act (which with the exception of its reference to railway-receipts is taken verbatim from S. 4, English Factors Act of 1842 and reproduced in the Factors Act of 1889, S. 1 (4), and applied in the Sale of Goods Act, 1893, S. (62) is explained by the following passage from Blackburn on Sale, Edn. 2, p. 415:

"There have been some attempts made to give the same effect to the indorsement of dock-warrants, wharfingers, receipts, delivery orders, and similar documents, as is given to the indorsement of a bill of lading.

Those documents are generally written contracts, by which the holder of the indorsed document is rendered the person to whom the holder of the goods is to deliver them and in so far they greatly resemble bills of lading but they differ from them in this respect that when goods are at sea the purchaser who takes the bill of lading has done all that is possible in order to take possession of the goods as there is a physical obstacle to his seeking out the master of the ship and requiring him to attorn to his rights; but when the goods are on land, there is no reason why the person who receives a delivery order or dock-warrant should not at once lodge it with the bailee and so take actual or constructive possession of the goods. There is therefore very sufficient reason why the custom of merchants should make the transfer of the bill of lading equivalent to an actual delivery of possession, and yet not give such an effect to the transfer of documents of title to goods on shore."

It was perhaps this distinction that the Court had in mind in *Great Indian Peninsular Railway Company v. Hanmandas Ramkison* (4), when declining to apply, as Farran J. had done, the English definition to "instruments of title" in S. 103, Contract Act, although admitting that it might be applied to the expression "document showing title" in S. 108 on the ground that dealings by factors entrusted with documents showing title were a different subject matter to assignments of instruments of title by the buyer of goods in transit.

It is clear that no distinction can be drawn from the difference of wording as in S. 102, which also relates to assignments by the buyer during transit, the expression used is "document showing title."

It seems to me that S. 137, T. P. Act, puts an end to the question. It recognizes that since the passing of S. 45, Sale of Goods Act, 1893, in England there is no force in the distinction drawn by Sir Charles Sargent in *Great Indian Peninsular Railway Company v. Hanmandas Ramkison* (4). It is to be noted that Ss. 102 and 103 are the only sections of the Contract Act which refer to assignment of documents of title and that S. 137, T. P. Act, which must be taken as part of the Contract Act, occurs in the chapter relating to the assignment of claims.

I am of opinion, therefore, that the appellants in each of these appeals are entitled to the benefit of S. 103, Contract Act against the unpaid vendor.

In Appeal No. 4 of 1912, the case was remanded to the lower Court for evidence upon certain issues of which issue 9 was:

"Whether by the custom of the trade railway receipts are not treated as instruments of title to the goods covered by them within the meaning of S. 108, Contract Act."

The evidence recorded as to the custom of merchants regarding railway receipts is very much to the same effect as that recorded in *Jethmal v. B. B. & C. I. Ry.* (5), the effect of which was stated by Tyabji, J., as follows:

"There is a great deal of evidence to show that there is a general practice, prevailing amongst merchants and commission agents in Bombay, to treat railway receipts as documents of title, representing the goods mentioned therein upon which advances can be obtained to the extent of 80 or 90 per cent of the value; that these receipts are usually endorsed in blank by the consignee and that such endorsements are recognized by the railway companies in Bombay and delivery is given accordingly."

Macleod, J., thus states the result of the evidence taken on remand:

"The buyer's name appears in the railway receipt and as a rule he advances

(5) [1901] 3 Bom. L. R. 260 at p. 269.

ces to the vendor 80 or 90 per cent of the value of the cotton when he gets the railway receipt, but some contracts, mostly those for Bengal cotton, are made on railway terms by which it is meant that the buyer contracts to advance 90 per cent as soon as he gets the railway receipt. Such receipts pass from hand to hand by endorsement and the evidence shows that buyers consider that the railway receipt gives them a title to the goods though as a matter of fact they take care to see that their endorser is a responsible person.

"Commission agents advance from 80 to 90 per cent on railway receipts. Their constituent is either up country in which case no question of unpaid vendor arises or a holder of a railway receipt in Bombay who endorses it over to them. None of defendant 2's witnesses lent money on railway receipts merely to earn interest. This, as far as the evidence goes, is only done by the banks and they invariably require the cotton to be in the bank's jetha or godown as security for the advance. It has then been proved in *G. I. P. Ry. Co. v. Hanmandas* (4), that amongst merchants and commission agents dealing in cotton in Bombay, railway receipts endorsed by one holder to another are considered as representing the goods and entitling the last endorsee to delivery. But it does not follow from that that there is a usage that the last endorsee is entitled to delivery as against an unpaid vendor who stops the goods in transit."

In connexion with this last observation, we may refer to the judgment of Ashhurst, J., in *Lickbarrow v. Mason* (6):

"The assignee of a bill of lading trusts to the indorsement; the instrument is in its nature transferable; in this respect, therefore, this is similar to the case of a bill of exchange. If the consignor had intended to restrain the negotiability of it, he should have confined the delivery of the goods to the vendee only: but he has made it an indorsable instrument. So it is like a bill of exchange; in which case, as between the drawer and the payee, the consideration may be gone into, yet it cannot

between the drawer and an indorsee; and the reason is, because it would be enabling either of the original parties to assist in a fraud. The rule is founded purely on principles of law, and not on the custom of merchants. The custom of merchants only establishes that such an instrument may be indorsed; but the effect of that indorsement is a question of law."

The learned Judge has overlooked the form of the issue remanded which is: whether by the custom of the trade railway receipts are not treated as instruments of title to the goods covered by them within the meaning of (i. e., in the sense in which that expression is used in) S. 103, Contract Act. The result of the railway receipt being such an instrument of title as against the unpaid vendor does not depend upon custom but is a matter of law which is stated in the section.

For all the above reasons, I am of opinion that the decision of the lower Court in Appeal No. 4 should be reversed; and for the reasons based both upon the special facts of the case and on S. 137, Contract Act, I am of opinion that the decision of the lower Court in Appeal No. 7 should also be reversed. In each case, the unsuccessful respondent must pay the costs throughout, except that in Appeal No. 4 the unsuccessful respondent, Ramdas, will have his costs of issues 1 to 5 and 8 against the appellants. In each case, the person, in whose hands the sale proceeds are, must hand over the net sale proceeds, deducting any charges justly due, to the successful appellants.

G.P./R.K.

Decrees reversed.

A. I. R. 1914 Bombay 294

SCOTT, C. J. AND DAVAR, J.

Yeshwant Vishnu Nene—Plaintiff—Appellant.

v.

Keshavrao Bhaiji and others—Defendants—Respondents.

Original Civil Appeal No. 9 of 1914, Decided on 14th August 1914, from judgment of Beaman, J.

(a) Lease—Construction—Tenant taking site for house on condition to occupy it so long as wadi, of which it formed part, remained in landlord's possession and to vacate it on payment of value of house on wadi ceasing to be in his possession—Landlord and tenant held to include their assigns.

(6) [1787] 2 T. R. 63 at p. 71=1 H. Bl. 357=6 East 20 note=1 R. R. 425=5 T. R. 683=4 Brown (P.O.) 57=102 E. R. 1191 note.

and that mere non-payment of rent does not give tenant right to property against landlord—Evidence Act, S. 116.

A tenant took a piece of land for building a house thereon on the condition that so long as the wadi of which the said piece of land formed a portion remained in the possession of the landlord, the tenant would occupy the land but when the wadi ceased to be in the landlord's possession and the land was required, the tenant was to be paid the valuation of the house and to vacate.

Held : (1) that the landlord whose possession was contemplated in the agreement must include both the landlord and his assigns, and in the same way the tenant would include his assigns ;

(2) that the tenant could not be ejected according to the terms of the agreement while the landlord remained in possession of the wadi and the land was not required by anyone else ;

(3) that the mere non-payment of rent by a tenant, if the tenancy is not discontinued, does not give him a right to the property as against the landlord. [P 295 C 1 ; P 296 C 1]

(b) Landlord and Tenant — "Fazendari" does not necessarily decide nature of tenure.

The word "fazendari," even though indicating the nature of the rent, does not necessarily decide the nature of the tenure which depends upon the agreement between the parties. [P 296 C 1]

Setalvad and Desai—for Appellant.

Kanga and Jardine—for Respondents.

Judgment.—This is an ejectment suit in which the plaintiff represents the landlord under two agreements of 1859 and 1860, and the defendants represent the tenant under those agreements.

The question is whether the plaintiff is entitled at any time to determine the tenancy which has been subsisting since the date of those agreements.

Now the first of them, Ex. A, is dated 5th March 1859, and the tenant there agrees as follows :

"There is your wadi by name Charni situate on the sea shore. I have taken the land fazendari (or on fazendari or as fazendar) being a portion of this wadi on the southern side for building a cadjan house. On this land I shall build a house at my cost within Rs. 50. The ground rent is fixed at Rs. 6 per annum which I will continue to pay from year to year. I will pay the assessment and if at any time you be in need of the ground appertaining to this house, I am to give the said ground to you and you are to pay me Rs. 50 being valuation thereof agreeably to what is written above."

At that time the intention was to build a cadjan house of the value of

only Rs. 50 and the tenant agreed to give up ground whenever it was required by the landlord.

In the following year, an agreement, somewhat different in terms, was entered into. It recites that the tenant has taken on fazendari land in the wadi for the purpose of building a cadjan house thereon. The agreement then continues :

"I shall build a house in the said wadi at my own cost. The fazendari rent in respect thereof is fixed at Rs. 9 per annum which I will continue to pay from year to year. I will pay the assessment. I shall build house on this land and live in it peacefully. I shall live there till the wadi remains in your possession. If the wadi ceases to be in your possession and if the land be required, you are to pay me the value of the said house whatever the same may come to. Otherwise I shall pull down my house and remove it."

It is to be observed that the value of the house is not stated in that agreement, but the rent is raised fifty per cent. from Rs. 6 to 9 and the condition as to surrender is worded quite differently. The tenant is to live in the wadi so long as it remains in the possession of the landlord. He is to be paid the valuation of the house when the wadi ceases to be in the landlord's possession and the land is required. Therefore his possession will not cease merely upon the wish of the landlord. For instance, if the landlord remains in possession and wishes him to vacate he would not have to vacate according to the condition in the second agreement.

Now we think that the landlord whose possession is contemplated there must include both the landlord and his assigns and in the same way the tenant would include his assigns. Here we have a suit in which the landlord sues to eject according to the terms of the agreement while he remains in possession of the wadi and the land is not required by anyone else. It appears to us that under the terms of the agreement he has no right in such circumstances to eject the tenant. That disposes of the suit and the decree of the lower Court dismissing the suit must be affirmed.

It must not be supposed however that we accept the view of the lower Court

with regard to the meaning of fazendari, when it occurs in a written document embodying the contract between the parties. On that point, we entirely agree with the remarks of Mr. Farran, J., in *Parmanandas Jivandas v. Ardeshir Framji* (1).

We also do not agree with the learned Judge in holding that the plaintiff's suit is barred by limitation. In the letter of 7th July 1871, the tenants who were then Atmaram Bhikaji and Bhai Lakshmanji, predecessors-in-title of the present defendants, instructed their attorneys to say that they did not recognize Ramnath Dadaji, predecessor of the present plaintiff, as the fazendar of the premises and could not see what right he had to interfere. Unless therefore Ramnath showed them that he was the fazendar they would complete purchase without regard to the threats contained in his letter. Then on 19th July after having been informed of the title of Ramnath Dadaji, the attorneys of Atmaram Bhikaji and Bhai Lakshmanji stated that they were ready and willing to pay rent at the rate of Rs. 9 per annum, if Ramnath removed the foundation of the wall which he had laid in front of their client's house and allowed the use of the old privy.

There is therefore no denial of the title of Ramnath Dadaji as the landlord of this ground and although there is no evidence that rent was paid between 1871 and 1901, the mere non-payment of rent by a tenant if the tenancy is not determined, does not give him a right to the property as against his landlord. Then it appears that in 1901 the plaintiff sued the defendants for rent according to the terms of the agreement of 1860 and after evidence had been given by the plaintiff the defendants agreed to a decree for the amount of rent prayed, on condition that the summons in the suit was amended by the insertion of the word "fazendari" as indicating the nature of the rent. We are of opinion that that word, even though agreed upon as indicating the nature of the rent, does not decide the terms upon which the defendant held and still holds, for his tenure must depend upon the terms of the agreement of 1860 taken together. Upon the terms of that agreement, we

are of opinion, for the reasons already stated, that in the circumstances which have been established in this case, the plaintiff has no right of ejectment.

We therefore affirm the decree of the lower Court and dismiss the appeal with costs.

G.P./R.K.

Appeal dismissed.

A. I. R. 1914 Bombay 296

HEATON AND SHAH, JJ.

Krishnadixit Baldixit—Defendant 2—Appellant.

v.

Baldixit Wamandixit—Plaintiff—Respondent.

Second Appeal No. 292 of 1912, Decided on 6th August 1913, from decision of Dist. Judge, Bijapur, in Appeal No. 41 of 1910.

Adverse possession—A's land let out by agent B to C in 1887—C in possession till expiry of lease—Rents accounted to A till 1893 when agent asserted himself to be owner—In 1908 B sued A for possession on ground that A's title was lost by adverse possession—Actual possession of C held to be legal possession of A—C being A's tenant till lease ended A's rights were unaffected and B's suit for possession could not be decreed.

In 1887, certain land belonging to A was let out by his agent B to one C for 18 years. C took possession under his lease and remained in possession until the term of lease expired. B received rents and accounted for them to A till 1893. In 1893, B asserted that he and not A was the owner of the land and thenceforth he himself kept the rents received from the tenant C and never accounted for them to A. On 17th September 1903, B sued to recover possession of the land on the ground that title of A was lost by adverse possession.

Held, (1) that as long as the tenant C held possession under the tenancy, he was the tenant of A and that he was A's tenant up to the last moment he held the lease;

(2) that as the actual occupation was with C, the tenant of A, the possession of the land was legally with A, till the expiry of the lease to C;

(3) that as B had not actual possession by himself or by a person deriving title from him, he could not acquire title by adverse possession;

(4) that as the tenant C remained in possession as a tenant of A, A's rights were not affected by a statement of adverse title and a refusal by B to account for rents received and;

(5) that consequently B's suit could not be decreed on the ground of acquisition of title by adverse possession. [P 297 C 1,2]

Coyaji and S. S. Patkar — for Appellant.

Jayakar and P. B. Shingne — for Respondent.

(1) See 27 L. C. 512=16 Bom. L. R. 723n.

Heaton, J.—This is an appeal which was determined by the District Judge of Bijapur on an assumed condition of facts. The assumed facts were these: That the land in suit belonged to defendant 2's family and that the members or a member of the plaintiff's family was an agent leasing the land out and taking rents and accounting for them to defendant 2's family. It was further assumed that in the year 1887, this agent on behalf of defendant 2's family leased the land by a registered lease for 18 years to one Ishvara; that Ishvara took possession under this lease and remained in possession until the term of the lease expired, or at least up to some time well within twelve years of the institution of this suit. Somewhere in 1893 or 1894 however the agent and his family asserted that they, and not defendant 2's family, were the owners of the land and thenceforth they kept the rents received from the tenant Ishvara and never accounted for them to defendant 2.

On these facts, it was contended that, however unimpeachable the title of defendant 2's family, that title had been lost by adverse possession beginning in 1893-94 with the assertion that I have mentioned.

Both the lower Courts found in the plaintiff's favour, that is, that the title by adverse possession has been made out. We think differently, and I will give as briefly as I can the reasons which have led me to this conclusion.

First of all, it appears to me plain both on principle and on authority that so long as Ishvara held this land under the tenancy, he held it as the tenant of defendant 2's family and their rights were just as good at the end of the tenancy as they were at the beginning, and were absolutely unaffected in any particular by the reiterated assertions made by the plaintiff of an adverse title or by the fact that the rents were retained by the plaintiffs or members of their family, except of course, that lapse of time would prevent recovery of the rents. It was suggested in argument that because the lease was executed to a member of the plaintiffs' family by name and because it was not stated that he was an agent for anyone else, that he was really the landlord and Ishvara was his tenant. I cannot think of any principle of law on which this position can properly be

based and I think none was indicated. The land belonged to the family of defendant 2, and they were the landlords just as they were the owners, and Ishvara was their tenant although his actual dealings were with their agent. So long as the tenant held possession under the tenancy, he was the tenant of defendant 2's family. He was their tenant up to the last moment he held the land under the lease, and when he relinquished the land, defendant 2 was at liberty to enter into possession; or if any difficulty or opposition was offered, he could bring a suit to remove that opposition or difficulty and his right to bring the suit would date from the moment when the tenancy terminated. That was far within twelve years from the date on which this suit was brought.

The District Judge has considered that the possession was adverse, because there was notice of adverse holding accompanied by an overt act. No doubt there was a notice that the plaintiff's family claimed the ownership and there was an overt act in that the rent was withheld. But the difficulty in the way of this argument is this: the possession or occupation rather, was with the tenant, and the tenant was the tenant of defendant 2's family, so that the occupation actually was derived from the defendant 2's family and the possession legally was with them. A very large number of authorities have been referred to but out of them all I will only mention two. The first is *The Secretary of State for India v. Krishnamoni Gupta* (1), where the nature of adverse possession is discussed in relation to facts in some respects similar to those in this case. The law pertinent to the point before us is summarized in a passage at p. 535: "In order to sustain a claim to land by limitation under the Indian Act, there must in their (Lordships') opinion be actual possession of a person claiming as of right by himself or by persons deriving title from him." To apply that principle here we find that the plaintiff's family had not actual possession by themselves or by persons who derived title from them. The person in actual occupation derived title from the defendant's family. Therefore the plaintiffs could not acquire the title

(1) [1902] 29 Cal. 518=29 I. A. 104=6 C. W. N. 617=4 Bom. L. R. 537 (P.C.).

by adverse possession. The other case is *Bissessur Dabeea v. Baroda Kanta Roy Chowdry* (2), and this is a use which is very strongly relied on by the counsel for the respondent. It was a case in which the zemindar, whose land was held by tenants, had his title jeopardized by the defendants in that case who had turned out the tenants and were claiming the land as against them. The Court held that though the tenancy still continued, there was a cause of action not only to the tenants but to the landlords, because their title was jeopardized. But how was it jeopardized? It was jeopardized because the defendants had turned out the tenants and taken possession of the land. We are invited to apply that principle to a case where there was no turning out of the tenant whatever where the tenant remained in possession as the tenant, and the only way in which the landlord's rights were affected was by a statement of adverse title and a refusal by an agent to account for rents received. It is perfectly true that defendant 2 or his family could have brought certain suits. They could no doubt have established their right to receive the rents. They could have obtained an order that the tenant was not to pay rent to any member of the plaintiff's family and so forth. But they could not have brought a suit for possession because there was no cause of action which entitled or enabled them to do that. They could not in short have brought any suit which would have fallen within the words of S. 28, Lim. Act. That is merely another way of reaching the conclusion at which I have already arrived.

The proper order in the case is to reverse the decree of the appellate Court which is based on a decision of a preliminary point, viz., limitation and to remand the case to be disposed of in the light of our finding on the issue of limitation.

Costs throughout to be costs in the cause.

Shah, J.—I concur in the conclusion arrived at and the order proposed by my learned brother. On the assumed state of facts, upon which the lower appellate Court has decided the question of limitation it is clear that there could be no

adverse possession of the plaintiff against defendant 2. The tenant was in possession from 1887 and had a right to remain in possession up to 1905. During this interval, defendant 2 had no right to recover possession. It is also clear on the assumed facts, that the property was not in the actual possession of the plaintiff claiming as of right by himself or by persons deriving title from him. He could not therefore sustain a claim to land by limitation.

Further in the present case, the repudiation of title based on the allegation that Anna was the heir of Yadneshwar in 1893, is not of such an unequivocal character as to amount to a notice to defendant 2 that he was going to claim the property adversely to him even if it were found that he was not Yadneshwar's heir. We have the fact that after that assertion of title, the revenue authorities decided in favour of the widow Jiwubai and did not accept Anna's claim. Subsequently in 1895 when Jiwubai died, there was an occasion for Anna to assert his title; but no such assertion was made. It is not suggested that he ever put himself forward as the heir of Yadneshwar on any subsequent occasion. I do not think it right to assume that Anna wanted to maintain the improper position which he took up in 1893, viz., that he was the heir of Yadneshwar and therefore the owner of the property in suit.

Secondly, the overt act which has been relied upon by the lower appellate Court amounts only to this that Anna received the rents from the tenant and withheld them from defendant 2. It is not established in this case that prior to 1894 the rents were regularly paid by Anna to defendant 2 from year to year. Accounts were made apparently at irregular intervals and it is difficult to say that the mere withholding of the rents by Anna at least for some reasonable time after the first assertion of his title in 1893, was such an overt act, as would suffice to make his enjoyment adverse. The present suit was brought on 17th September 1908, and the overt act which the plaintiff must prove must be prior to 20 years before the date of the suit. It is quite possible that honestly acting the plaintiff may have made up as before his accounts in 1896, or in 1897, and withholding the payment

of rents for two or three years would not, in the circumstances, be necessarily an overt act of such a character as would justify the finding on the question of limitation. The subsequent withholding of rents in the present case is not a matter of much moment, because the repudiation of title and the overt act must necessarily be more than 12 years prior to suit.

On these grounds, I think that the finding on the question of limitation cannot be accepted.

G.P./R.K.

Case remanded.

A. I. R. 1914 Bombay 299

SCOTT, C. J., AND BATCHELOR, J.

Tayabali Ghulam Hussein and others
—Defendants—Appellants.

v.

Atmaram Sakharam Vani—Plaintiff
Respondent.

Second Appeal No. 509 of 1913, Decided on 24th March 1914, from decision of Asst. Judge, Khandesh, in Appeal No. 327 of 1910.

(a) Civil P. C. (1908), O. 21, Rr. 58 and 63—R. 58 applies even to debts attached in execution — Garnishee cannot plead defence proved unsuccessful in execution inquiry except in suit within one year from adverse order.

Order 21, R. 58 applies in terms to any property attached in execution and thus relates to debts so attached. Under O. 21, R. 63 it is not open to a garnishee to plead a defence which has already in execution inquiry been unsuccessful, except in a suit instituted within one year from the date of the adverse order.

[P 300 C 1, 2]

(b) Civil P. C. (1908), O. 7, R. 6—Cross-debts due to garnishee can be set off and equity from that can be set up without paying court-fee.

If a cross-debt is due to the garnishee at the date of attachment, he has a right of set-off in his favour, and the equity arising from the cross-debt can be set up without payment of a court-fee.

[P 299 C 2]

Shortt and M. V. Bhat—for Appellants.

Weldon and R. R. Desai—for Respondent.

Judgment.—In execution of a decree in Suit No. 689 of 1904 against Baba Ismail, a debt of Rs. 1,023 alleged to be due to the judgment-debtor by the firm of Tyabali Gulam Hussein, the present defendants, was attached by the judgment-creditor, the present plaintiff, under S. 268 of the Code of 1882. The garnishees received notice to bring into Court the amount of the alleged debt,

but as they disputed their liability they objected to the attachment and the judgment-creditor having put in an answer, they gave evidence before the executing Court to prove that they in fact owed nothing to the judgment-debtor as, although Rs. 594 were due by them to the judgment-debtor's Chalisgaon shop, Rs. 676 was due to them by the judgment-debtor's Pachora shop. This evidence was given on 4th September 1905 and thereafter on the same day the plaintiff applied for sale of the debt of Rs. 594. The executing Court then ordered that this debt should be sold. On the sale it was purchased by the plaintiff who now brings this suit to recover the Rs. 594 from the garnishees.

The garnishees set up the same facts in defence as they set up when they unsuccessfully objected to the attachment. The learned Judge in the lower appellate Court was of opinion that the Chalisgaon and the Pachora accounts being separate, the defendants could not claim that the Pachora debt should be taken into account, for the judgment-creditor had not made himself responsible for the judgment-debtor's debts having only purchased one of his assets. If this were the only question in the case we should reverse the decree of the Assistant Judge for, as decided in *Tapp v. Jones* (1), if a cross-debt were due to the garnishee at the date of the attachment it is obviously just that there should be a right of set-off in his favour: this principle is recognized by the Indian Legislature in the T. P. Act, S. 132: see illus. (i). We also do not agree with the Subordinate Judge in the trial Court that the equity arising from the cross-debt could not be set up by the defendants except on payment of a court-fee as on a counter-claim.

The more serious question for the defendants is, we think, whether the defence to set-off is open to them after their failure to raise the attachment, as no suit has been filed by them within a year from 4th September 1905 to establish the right alleged by them and not allowed by the executing Court.

The point was not taken by the plaintiff in the lower Court and was just suggested from the Bench in this appeal.

(1) [1875] 10 Q. B. 591 at p. 593=44 L.J.Q.B. 127=38 L. T. 201=23 W. R. 694.

We have now heard arguments upon the point.

The defendants' counsel relies upon the decision of *Mt. Rambutty Kooer v. Kamessur Persad* (2) which upon the facts found was a similar case to the present. We are however unable to accept it as an authority, for two reasons. First, because S. 246 of the Code of 1859 provided that the party against whom an order might be given on investigation might bring a suit to establish his right within one year from the date of the order; a provision which the Court held would not necessarily prevent the garnishee from setting up the same defence upon an action brought against him by the purchaser of the debt. This ruling is no longer applicable, for S. 283 of the Code of 1882 (O. 21, R. 63, of the present Code) provides that the order on the investigation shall, subject to the result of such suit if any, be conclusive. It is therefore no longer open to a garnishee to plead a defence which has already in an execution inquiry been unsuccessful except in a suit instituted within one year from the date of the adverse order. Secondly, we are unable to follow the argument of the Calcutta Judges based upon other sections of the Act of 1859, for it seems to ignore the finding arrived at, that the property attached was not money but a debt, and the provisions of S. 265, which provided for the delivery of debts sold in execution.

The other case relied on by the appellants was *Harilal Amthabhai v. Abhesang Meru* (3) in which on an unargued reference for opinion from a Subordinate Court the Judges expressed the opinion that S. 278 of the Code did not apply to objections to the attachment of debts, but that the Court should satisfy itself that a debt was existent before selling it. This decision does not appear to us wholly consistent with that in *Mansukh Umed v. Bhagwandas Jamnadas* mentioned in the Subordinate Judge's reference in *Harilal Amthabhai v. Abhesang Meru* (3). We cannot accept an expression of opinion on an unargued reference as a binding authority. A different view of S. 278 has been taken by a Full Bench of the Madras High Court after argument in *Chidambara*

Patter v. Ramasamy Patter (4) overruling *Basavayya v. Syed Abbas Saheb* (5), a decision based upon *Mt. Rambutty Kooer v. Kamessur Pershad* (2). We agree with the Full Bench of the Madras High Court. It is of importance that garnishees' claims and objections should be decided at least as promptly as other objections to attachment.

Order 21, R. 58, applies in terms to any property attached in execution and thus relates to debts so attached. The sum of Rs. 594 appearing due, in one set of the garnishees' books, to the judgment-debtor was not liable to attachment if it was in fact cancelled by another debt due by the judgment-debtor to the garnishees in another set of books. If it was not so cancelled it was attachable property constructively in the possession of the judgment-debtor. In another view also the question raised by the garnishees called for investigation under S. 278 and the following sections, for the debt attached could be regarded as property in the possession of the garnishees in trust for the judgment-debtor; see *Vinall v. De Pass* (6).

We dismiss the appeal without costs.
G.P./R.K. *Appeal dismissed.*

(4) [1904] 27 Mad. 67=13 M. L. J. 467 (F. B.).

(5) [1902] 24 Mad. 20.

(6) [1892] A. C. 90 at p. 95=61 L. J. Q. B. 507=66 L. T. 422.

A. I. R. 1914 Bombay 300

SCOTT, C. J., AND BEAMAN, J.

Mahableshwar Krishnappa — Appellant.

v.

Ramchandra Mangesh Kulkarni — Respondent.

Second Appeals Nos. 160 and 161 of 1910, Decided on 10th July 1913, from decision of District Judge, Kanara, in Appeals Nos. 30 and 29 of 1908.

(a) **Hindu Law—Minority and Guardianship**—Right of father to appoint manager and trustees of family estate is recognized and arrangement by him for guardianship is binding on sons and wives.

The right of a dying Hindu father to appoint managers and trustees of the family estate without interfering with the succession is recognized, and any such arrangement for guardianship and management made by him is binding on sons and wives. [P 301 C 1]

(b) **Hindu Law** — Mother of undivided nephew consenting to arrangement of appointment of guardian—Such consent shall be considered to have been in interests of

(2) [1874] 22 W. R. 36.

(3) [1879-80] 4 Bom. 321.

minors—Alienation by such guardian binds minors.

Where the mother of an undivided nephew acquiesces in an arrangement, she being, in the absence of any other lawfully appointed guardian, the guardian of her sons' interests, the acquiescence would be considered to have been in the interests of the minors concerned and the best arrangement that could have been made. An alienation made by such a guardian would be binding on the minors. [P 301 C 2]

(c) Limitation Act (1908), Art. 44—Scope.

A suit for a declaration challenging the alienation is governed by Art. 44. [P 301 C 2]

(d) Hindu Law—Joint family—Minor coparcener becoming adult and manager can give discharge and acquittance on behalf of other minor family members—Suit barred against him is barred as regards minors under Limitation Act (1908), Art. 7.

In a Hindu joint family one of the minor coparceners on becoming adult and manager can give discharge and acquittance on behalf of other minor members of the family, and a suit barred as regards him, would be barred as regards the minors as well under S. 7. [P 301 C 2]

Dhurandhar, Nilkanth Atmaram and G. P. Murdeshwar—for Appellant.

Nadkarni, S. S. Patkar and V. R. Sirur—for Respondent.

Scott, C. J.—The mukhtyarnamah (Ex. 68) was executed by Krishnappa in order to provide for the management of the estate (including the settlement of money debts and pecuniary claims) both during Krishnappa's lifetime and after his death until the attainment of majority by the eldest minor in the family, i.e., plaintiff 1. The document was similar in design to the hibbahnamah in *Rajlahki Dabea v. Gokool Chander Chowdury* (1), but was dissimilar in that, instead of prohibiting the guardian and manager from making gifts or sales, it gave Manjappa after Krishnappa's death power to manage as he thought fit.

In a family consisting in other respects of minors and women, it is a matter of practical convenience that the dying adult male should be able to make arrangements for guardianship and management, otherwise a dead-lock and loss would be arrived at through various widows quarrelling among themselves.

The Privy Council in the case above-mentioned have recognized the right of the dying adult to appoint managers and trustees without interfering with the succession. So also in *Soobah Pirthi Lall Jha v. Soobah Doorgah Lal Jha* (2), the Bengal High Court held

that a Hindu might by will appoint one widow guardian of all his sons to the exclusion of the natural mother of two of them, even though the will should prove invalid so far as it purported to affect the devolution of the property.

If the right of the father to make a binding arrangement is restricted to the interests of his own sons and wives (for the cases above cited go no further), yet in the present case the mothers of Krishnappa's undivided nephews acquiesced in the arrangement and they in the absence of any other lawfully appointed guardians were the guardians of their son's interests. There is every reason to suppose on the findings of the lower Courts that such acquiescence was in the interests of the minors concerned and the best arrangement that could have been made. Nothing however turns on the question whether Manjappa was the lawfully appointed guardian of Krishnappa's nephews or the agent of such a guardian, for the nephews were all dead before these suits were instituted and their interests devolved by survivorship upon plaintiffs 1 and 2.

It appears to me that the sale by Manjappa was binding on plaintiffs 1 and 2 as being within the authority conferred by Ex. 68. It was certainly not a nullity and none but the plaintiffs 1 and 2 could challenge it. Plaintiff 1's right, if any, to challenge it was barred at the date of suit under Art. 44. He could, on becoming manager (as he did when 18 years of age), have given a discharge and acquittance to defendants of all claims on them in respect of the leasehold interests if the defendants had chosen to reconvey them and such acquittance would have been binding on his minor coparcener, plaintiff 2. This plaintiff is therefore barred under S. 7, Lim. Act.

We affirm the decrees of the lower Courts and dismiss the appeals with costs.

Beaman, J.—I entirely concur.
G.P./R.K. *Decrees confirmed.*

(1) [1869-70] 13 M.L.A. 209=3 B.L.R. 57=12 W.R. 47=20 E. R. 529 (P.C.).

(2) [1867] 7 W.R. 73.

A. I. R. 1914 Bombay 302 (1)

SCOTT, C. J., AND BATCHELOR, J.

Hari Balu Gaekwad and others—Applicants.

v.

Ganpatrao Sakhujirao Gaekwad and others—Opposite Parties.

Civil Appln. No. 142 of 1913, Decided on 26th September 1913, from decree of First Class Sub-Judge, Ratnagiri, in Appeal No. 445 of 1912.

Provincial Small Cause Courts Act (1887), S. 23—Suit filed as Small Cause in Court having small cause and regular jurisdiction—Suit transferred to regular file under S. 23—Judge could not return plaint for presentation to another Judge former being empowered to determine question of title—Decree by such Judge held appealable.

A suit was originally filed as a Small Cause Suit in the Court of a Judge having both Small Cause Court and regular jurisdiction. Finding that the right of the plaintiff and the relief claimed by him depended on proof or disproof of a title to immovable property, which the Small Cause Court could not finally determine, the Judge, acting under the power contained in S. 23 caused the suit to be transferred to his file as an ordinary Judge at a very early stage after the plaintiff had been examined.

Held : (1) that the powers conferred by S. 23, were put in force in a regular manner ;

(2) that the Judge could not return the plaint for presentation to another Judge, because he himself was the Judge having jurisdiction to determine the question of title; and

(3) that the decree passed by the Judge was not final but open to appeal. [P 302 C 1, 2]

B. V. Vidwans—for Applicants.

P. V. Kane—for Opposite Parties.

Judgment.—The only question in this case is whether the lower appellate Court rightly entertained the appeal. The suit was originally filed as a Small Cause Court suit in the Court of a Judge having both Small Cause Court and regular jurisdiction. Finding that the right of the plaintiff and the relief claimed by him depended upon proof or disproof of a title to immovable property which the Small Cause Court could not finally determine, the Judge, acting under the power contained in S. 23, Provincial Small Cause Courts Act, caused the suit to be transferred to his file as an ordinary Judge at a very early stage after the plaintiff had been examined. There was no substantial irregularity in this. He could hardly return the plaint to be presented to another Judge, because he himself was the Judge having jurisdiction to determine the question of title ; and no point

is made of the fact that the evidence of the plaintiff recorded before him as a Small Cause Court Judge was used in the regular suit. We think that it must be taken that the powers conferred by S. 23 were put in force in a regular manner. He then passed a decree deciding the question of title. It was a decree which could not be passed by a Court of Small Causes ; it was not a decree falling within the terms of S. 27, Small Cause Courts Act, and was therefore not final. It was therefore, appealable and the lower appellate Court rightly entertained the appeal. In support of the argument that the decree was not appealable, reference has been made to *Kali Krishna Tagore v. Izzat-anissa Khatun* (1). In that case, the question was whether a suit was cognizable by a Court of Small Causes within the meaning of S. 586, old Civil P. C., so as to bar a second appeal, and the learned Judges came to the conclusion that the suit, although it might fall within the class of suits contemplated by S. 23, would nevertheless be a suit cognizable by a Court of Small Causes. That however is not the point before us. The question is whether the decree which was actually passed by a Court, to which the suit originally so cognizable was transferred, was a final decree under the Small Cause Courts Act. For the reasons above stated, we are of opinion that it was not. Therefore, we cannot interfere under our extraordinary jurisdiction. We discharge the rule with costs.

G.P./R.K.

Rule discharged.

(1) [1897] 24 Cal. 557.

A. I. R. 1914 Bombay 302 (2)

SCOTT, C. J. AND BEAMAN, J.

Chimna Sadashiv—Plaintiff—Appellant.

v.

Ramdayal Prayag Das—Defendant—Respondent.

Second Appeal No. 217 of 1913, Decided on 22nd July 1914 from decision of Dist. Judge, Dhulia, in Civil Appeal No. 39 of 1909.

Civil P.C. (1882), Ss. 282 and 283 Property sold subject to mortgage lien in execution of decree—Claim of mortgagee recognized under S. 282—Suit to assert mortgage—Purchaser setting up that mortgage was fraudulent—Suit to set aside mortgage under S. 283 held to be not necessary and purchaser would

therefore set up fraudulent nature of mortgage under Evidence Act, S. 44.

A claimed to be the holder of a mortgage upon certain property which had passed to B on a sale in execution of a decree. In execution proceedings under that decree A's claim was recognized under S. 282 but B did not challenge that claim under S. 283 of the Code. The property was sold subject to the charge. A then sued to assert this mortgage. B set up that mortgage was fraudulent. A contended that the order under S. 282 was conclusive as it was not set aside in a suit filed under S. 283 within a year from its date.

Held: that S. 283 can only contemplate a suit based upon facts known to the party against whom an order was passed under S. 282 within a year from the date of the order and that if B was not aware of the fraud within a year and became aware of it afterwards, he could under S. 44, Evidence Act, assert the fraudulent nature of A's application and the consequent invalidity of the order passed upon it in any proceeding instituted by A on the strength of such order. [P 303 C 2]

Setlur and T. R. Desai—for Appellant.

G. S. Rao and P. D. Bhide—for Respondent.

Judgment.—The present plaintiff claims to be the holder of a mortgage for Rs. 3,000 and interest upon certain property which has passed to defendant 5, the respondent, on a sale in execution of a decree. In the execution proceedings under that decree the present plaintiff intervened and asserted his claim as a mortgagee and prayed that the auction sale should be held after reserving the mortgage lien of the amount of Rs. 3,580 with future interest and that the said sum should be awarded to the plaintiff. The executing Court ordered notices to issue to the opponents namely, the plaintiff and the defendant in the suit in which the execution proceedings had been instituted, and on the returnable date of the notices the order was made that "the mortgage is admitted, I grant the application with all costs on the opponents." That, we think, was clearly an order under S. 282, Civil P. C. of 1882, and it was an order against both the opponents and therefore the plaintiff (the present respondent and defendant 5) was bound, if he wished to challenge the order, to institute a suit to establish the right that he claimed within the year prescribed by the Limitation Act. That suit was not instituted. The property was sold and in the proclamation it was stated to be subject to mortgage liens to the extent of upwards of Rs. 9,000, and it is not

contended that that sum did not include the mortgage alleged by the present plaintiff. The present respondent was a purchaser through the Court and remained in possession of the property for some years. Then the plaintiff took steps to assert the alleged mortgage which was operative, as he said, not only against the property held by the present respondent but against the property held by defendants 2 to 4 in this suit, and they set up that the mortgage was fraudulent. The lower appellate Court has allowed the present respondent to set up the same defence, and it has been held in the lower Courts that the mortgage was fraudulent. The plaintiff-appellant contends that the order under S. 282 was conclusive, not having been set aside in a suit filed within a year from its date. It appears to us that S. 283 can only contemplate a suit based upon facts known to the party against whom an order was passed under S. 282 within a year from the date of the order. If he was aware of the fraudulent nature of the mortgage, it was part of the cause of action he would have to allege in such a suit filed within a year; if however, he was not aware of the fraud and became aware of it afterwards, he could under S. 44, Evidence Act, assert the fraudulent nature of the plaintiff's application and the consequent invalidity of the order passed upon it in any proceeding instituted by the plaintiff on the strength of such order. The question therefore we must have decided in this case before we can deal with it in appeal, is whether defendant 5 was aware of the fraudulent nature of the plaintiff's mortgage transaction within a year of the date of the order of 6th March 1897. We remand the case to the lower appellate Court for a finding upon that issue, the finding to be returned within three months. The onus of proof will be upon defendant 5.

G.P./R.K.

Case remanded.

A. I. R. 1914 Bombay 303

DAVAR AND BEAMAN, JJ.

In re Arbitration between Bombay Gas Co., Ltd., and Bombay Electric Supply and Tramways Co., Ltd.

Original Civil Jurisdiction, Decided on 27th March 1914.

Electricity Act (1910), Ss. 14 and 19 — Company cutting off access to one's property by act in exercise of powers — Damages held to be subject of compensation under S. 19 and S. 14 is inapplicable.

Where a Gas Company was cut off from reasonable access to its own property by act done in the exercise of its power by an Electric Supply Company, and those acts were not so done as to cause the least damage, detriment or inconvenience to the Gas Company that might be :

Held : that upon a true construction of Act 9 of 1910, the damage claimed to have been suffered by the Gas Company was the subject of compensation under S. 19 of the Act.

(2) That S. 14 did not apply and the Gas Company could not be deprived of its remedy in respect of the portion of the cables.

[P 304 C 1, 2]

Strangman — for Bombay Electric Supply and Tramway Co.

Binning—for Bombay Gas Co.

Judgment.—In the special case submitted to us by the arbitrators there are two questions for our consideration. In our opinion the first question referred must be answered in the affirmative. Large powers are conferred upon licensees under the Act, but these are accompanied by certain obligations. Thus under S. 19 of the Act of 1910, the licensee is under the obligation of causing as little damage, detriment or inconvenience as may be in exercise of the powers conferred upon him "and shall make full compensation for any damage, detriment or inconvenience caused by him or by anyone employed by him." The question is thus worded: "Whether upon a true construction of Act 9 of 1910 the damage claimed to have been suffered by the Gas Company is the subject of compensation under S. 19 of the said Act?" Clearly it is. For the damage claimed to have been suffered lies in the Gas Company having been deprived of access to its own property by acts done by the Supply Company in the exercise of its power. The Supply Company's contention is that such damage could not be the subject of compensation under S. 19, because it was not caused in the "exercise of the power" but was a mere consequence of what was otherwise in all respects rightly done by the Supply Company in the exercise of that power. This, in our opinion, is wrong. Whether there was in fact damage or not, what is alleged as damage was clearly caused once and for all in the exercise of the power conferred upon it by the Supply Company,

when by laying its wires over the Gas Company's pipe, it cut the latter off from reasonable access to its own property. The case of *Swansea Corporation v. Harpur* (1), cited in support of this contention, is so different both in its facts and the principle upon which it is decided, that we think it unnecessary to discuss it. It is further contended on behalf of the Supply Company that if in the exercise of the powers conferred upon it, it has caused as little damage, detriment or inconvenience as may be, it cannot be liable in damages under S. 19. Whether it has, in fact, caused as little damage as may be, is not a question of law but of fact, and must be answered by the arbitrators. But assuming that that is the true construction of the sentence, notwithstanding the words immediately following, "make full compensation for any damage," it would still be a question of fact whether and to what extent that minimum damage had been exceeded, and, if exceeded even by one rupee, the licensee would be bound to pay that rupee. The point of the Gas Company's complaint is that more than this minimum of damage, detriment or inconvenience was caused by the Supply Company, and that is a question yet to be answered by the arbitrators.

In our opinion, the second question must be answered in the negative. What the question really invites us to do, although it might perhaps have been more happily worded and the Hon'ble Advocate-General admits this, is to decide whether in this matter the Gas Company was bound to proceed under S. 14 or, in other words, whether that section applies. For, if it does, there is an end of the Gas Company's case. There could be no claim for damages by the operator against the owner under that section of the nature of the damages now claimed by the Gas Company. All acts done under that section are done by the operator or by the owner at his request and expense. It is therefore perfectly clear that the operator could not claim damages for acts of his own or done on his behalf and at his expense by the owner. Here the claim is quite differently grounded.

(1) [1912] 3 K. B. 493=81 L. J. K. B. 1103=107 L. T. 6=76 J. P. 409=10 L. G. R. 677.

What in effect the Gas Company complains of is that it was cut off from access to its own property by acts done in the exercise of its power by the Supply Company and that those acts were not so done as to cause the least damage, detriment or inconvenience to the Gas Company that might be.

Costs of this reference to be dealt with by the Arbitrators.

G.P./R.K.

Order accordingly.

A. I. R. 1914 Bombay 305

MACLEOD, J.

On difference between

HEATON AND SHAH, JJ.

Gangapa Kardepa and others—Accused—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 282 of 1913, Decided on 18th September 1913, from judgment of Sess. Judge, Bijapur.

(a) Evidence Act (1872), S. 30—Confession by co-accused once proved must be taken into consideration.

The confession referred to in S. 30 cannot be restricted to an unretracted confession as once a confession is proved it may be taken into consideration. [P 310 C 1]

(b) Evidence Act (1872), S. 30—S. 30 does not prevent Courts from convicting after duly considering confession—But High Court rules of practice must be observed by Judges exercising discretion under S. 30.

There is nothing in the section to prevent a Court from convicting after taking the confession into consideration, or to fetter the discretion of the Court, but the High Courts in India have laid down rules of practice which deserve all the reverence of law, and ought to be observed by Judges when exercising their discretion under S. 30. [P 310 C 1]

(c) Evidence Act (1872), S. 30—(Per Macleod and Shah JJ.) Conviction solely on confessions of co-accused cannot be sustained: (Heaton, J. contra.)

A conviction founded solely on the confessions of co-accused cannot be sustained: 15 Bom. 66, Foll.

Per Heaton, J.—A man may be convicted solely on the confessions of co-accused.

[P 310 C 2]

(d) Evidence Act (1872), S. 30—Confession of co-accused is different from testimony of accomplice.

The confession of a co-accused stands on quite a different footing to the testimony of an accomplice. [P 311 C 1]

(e) Evidence Act (1872), S. 30—Accused cannot be convicted solely on confession of co-accused by Judge with assessors—Judge when sitting with jury may withdraw confession from jury or direct to acquit unless it is corroborated by independent evidence.

A Judge sitting with assessors ought never to convict an accused solely on the confession of a co-accused, but where he is sitting with

a jury, he has a discretion, to either withdraw the confession from the jury or put it before them with the direction that they ought to acquit unless it is corroborated in material particulars by independent evidence.

[P 311 C 1]

(f) Evidence Act (1872), S. 113 (b)—Section applies to testimony of accomplice and not to confessions.

Section 114, illus. (b) only applies to the testimony of an accomplice given on oath before the Court, and not to confessions before a Magistrate. [P 311 C 1]

Desai G. S. Rao and H. B. Gumaste—for Appellants.

Strangman and S. S. Patkar—for the Crown.

Preliminary Judgment.

Heaton, J.—28th August 1913.—In this case eleven persons were tried for dacoity. Seven out of the eleven either before a Third Class Magistrate or the Committing Magistrate or both confessed to their guilt and implicated the other four. As regards these seven there was other evidence besides their confessions. All eleven were convicted and all have appealed.

As regards the seven who made confessions, I think the evidence is conclusive.

The only matter which requires serious consideration as regards them is whether to their confessions the provisions of S. 24, Evidence Act apply, so as to render them irrelevant. The matter was considered by the trying Judge and he came to the conclusion that the confessions were relevant. Accused 1 confessed only to the Committing Magistrate and accused 2 and 5 before the Committing Magistrate confirmed the confessions they had previously made. Before the Committing Magistrate accused 3, 6, 7 and 8 repudiated their confessions and two of them Nos. 6 and 7 produced written statements. These two, therefore, had evidently carefully considered the matter. I infer that the others had done the same. Hence the fact that accused 1, 2, and 5 confessed to the Committing Magistrate is, in the circumstances, a peculiarly strong reason for holding that the confessions of all were given in a way that did not offend against the provisions of S. 24, Evidence Act. This inference is confirmed by the manner in which the confessions were recorded and by the assurance of

the Magistrate who recorded them that they were voluntarily made.

Against this is the circumstance that the confessing accused were in each instance for three or four days in the custody of the police before they confessed and that whilst in such custody they produced property alleged to be stolen. How it came about that they were so long in police custody does not appear. Accused 3, 6, 7 and 8 were all defended by three pleaders but no cross-examination of witnesses was directed to this matter. The Magistrate who recorded the confessions was aware of it, yet he was satisfied that the confessions were voluntary.

I do not find any good reason for rejecting these confessions. They appear to me to be relevant.

I would, therefore, confirm the convictions of accused 1, 2, 3, 5, 6, 7, and 8.

As regards the other four, questions on which my learned colleague and myself are not agreed have arisen.

Against the other four, there is nothing substantial to show that they took part in the dacoity except the confessions of the other seven. It has been contended first of all that, as was decided in the case of *Queen-Empress v. Khandia bin Pandu* (1), the confession of a co-accused is not technically evidence and that, therefore, a conviction based on the confession of co-accused, whether one or more than one, is illegal. As to this point, so far as my own knowledge goes, the ruling where it asserts that the confession of a co-accused is not evidence, has not in practice been followed. The confession of a co-accused has always within my experience been treated as evidence. The Special Tribunal of three Judges, of which I was a member, which tried the *Nasik Conspiracy* case, certainly did treat the confessions of co-accused person, as evidence. These confessions were tested as far as possible, and were weighed by such knowledge and experience as we possessed, and we determined whether they had or had not probative force: that is to say, we dealt with them precisely as if they were evidence. Undoubtedly in my opinion, they fall within the definition of evidence in the Evidence Act; for these confessions are documents submitted to the inspection of the

Court. Then S. 30 by its own terms applies only where the confession is proved; that is, it applies only to a confession which has become evidence in the case, and the section provides that it may then be taken into consideration against the person implicated as well as against the person making it. These words, in my judgment, are exactly appropriate to making the confession, which is already evidence in the case, evidence against the person implicated as well as the other accused. There are authorities on the point but the only one I will refer to is *Empress v. Ashootosh Chukerbutty* (2). In this case the Judges did regard the confession of a co-accused as evidence for reasons which to me are convincing. Therefore, it is that I feel bound to decline to follow the ruling in *Khandia's* case (1) and feel that I must treat the confessions of the co-accused as evidence for the purpose of all the accused.

The second point is that even so regarding the confessions, they are evidence of so peculiar a character that to found a conviction on that class of evidence alone is illegal and for this proposition there is the authority of the Calcutta case already referred to. But to this proposition also I must respectfully demur. There is, I believe, no law whatever prescribing the credibility of evidence. Matters relating to the admission of evidence are matters of law, but the credibility of evidence is a matter left to the knowledge, experience and logic of the Court that has to decide on the evidence. I think that much of the confusion which has arisen, more particularly in the case of accomplice evidence, has arisen out of the fact, that questions of credence and questions of law have not been rigorously kept apart but have been confused together. Moreover I think that if a Court lays down a rule touching the credibility of evidence, it does that which it has no authority to do and which it ought to be against the conscience of the Court to do. How can a Court however eminent, lawfully say that a Jury in some future case shall not be convinced by some particular class of evidence?

Dealing with cases of the four appellants against whom there is nothing but the confessions of co-accused, the

(1) [1891] 15 Bom. 66.

(2) [1879] 18 Cal. 483=3 C. L. R. 270.

matter in my judgment stands thus. The confessions are admissible in evidence. They are not found by the Sessions Judge to offend against any of the provisions of the Evidence Act and I do not think they do so offend. I think also that they are substantially true statements and are not the result of police or other tutoring. A careful perusal of the statements themselves convinces me of this. It is perfectly true that you cannot from the statements collectively gather with absolute precision either what the maker of each statement himself did or what each one of the others did. But this, it seems to me, is due to the fact that each of these accused persons told his own story in his own way. I have, therefore, come to the conclusion that we have here the implication of four accused persons from seven different and independent sources. To my mind, as a matter of human knowledge and experience it is almost inconceivable that seven men should independently falsely accuse the same four persons. If, as I believe to be the case, the seven accused have independently implicated the other four, then I regard the evidence in this case as coming nearer to scientific proof than is to be found in the majority of cases in which persons are convicted.

It has, I am aware, been held, and it is often argued, that one accomplice or one co-accused cannot corroborate another. Why this argument is advanced is difficult to understand, when one refers to the comment on illus. (b) to S. 114, Evidence Act. That comment gives precisely this kind of corroboration as in certain circumstances a sound foundation for belief.

I should, therefore, confirm the convictions of all the eleven accused, but as my learned colleague is of a different opinion as regards accused 4, 9, 10 and 11, this case will, as regards them, have to be referred to a third Judge.

Shah, J.—In this case, eleven persons were jointly tried on a charge of dacoity under S. 395, I. P. C. All of them have been found guilty by the lower Court.

The present appeal is preferred by accused 4, 9, 10 and 11.

There can be no doubt in this case that a dacoity was committed at the house of one Aminappa. The main

question in the appeal is whether accused 4, 9, 10 and 11 are proved to have taken part in the dacoity. The case against them rests chiefly upon the confessional statements of co-accused 1 to 3 and 5 to 8.

In addition to these statements the learned Government Pleader has relied upon two circumstances: viz., (1) the production of certain cash by accused 4; and (2) the conduct of accused 9 to 11 in remaining absent from the usual quarters for some time. The learned Sessions Judge does not attach much importance to these circumstances. I think that the production of cash, which is not identified as being part of the loot, does not afford any corroboration of the guilt of accused 4. As regards the conduct of accused 9 to 11, I am unable to attach much weight to it, as by itself it is quite insufficient to afford any material corroboration to the confessional statements of the co-accused. The two accused 9 and 10 in fact surrendered not long after the warrants were issued. The case against the appellants must rest ultimately on the confessions of the co-accused. I agree with the Sessions Judge that "If these four accused persons are to be convicted the conviction can be based only on the confessions of co-accused considered against them under S. 30, Evidence Act."

Coming now to these confessions, the learned Sessions Judge has declined to follow the ruling of this Court in *Queen-Empress v. Khandia* (1) and has given his reasons for adopting the view that if a Judge feels convinced of the truth of the story as contained in the confessions of the co-accused, not only may he consider the statements but he is bound to act upon them even though there may be no evidence outside those statements to corroborate the story in material particulars. I am unable to agree with the Sessions Judge in his view that the decisions of this Court and of all the other High Courts in India, at least Madras and Calcutta High Courts, have put an erroneous interpretation upon S. 30, Evidence Act. I feel clear that the confessions of co-accused may be taken into consideration under S. 30, Evidence Act, along with other evidence in the case; but if there is no evidence in the case outside these statements, a conviction based

only upon the confessions of the co-accused is not good in law. The confessions of the co-accused could not be considered at all against the other accused but for the provisions of S. 30, Evidence Act. These confessional statements are not made on oath and have not been tested by cross-examination. Their evidentiary value is very low. They stand on a much lower footing than the evidence of an accomplice. It is clear, therefore, that obvious considerations of justice require that a Court, before acting upon such statements, should insist upon independent corroboration from other evidence in the case in material particulars, particularly as to identity.

It is not a matter of much moment to my mind whether these statements are treated as evidence in the case or are treated as matter which may be taken into consideration under S. 30, Evidence Act. The substantial distinction which the Courts have insisted upon that the matter (or evidence) which may be taken into consideration under S. 30, Evidence Act stands on a different footing from the other evidence in the case. No matter, which can be taken into consideration only under S. 30, if there is no evidence other than such matter, can form the basis of a legal conviction. I understand this to be the effect of the rulings to which I shall presently refer.

The Madras High Court has consistently adopted this view almost ever since the passing of the Evidence Act: see the *Proceedings dated 24th January 1873* (3); *Reg. v. Ambigara Hulagu* (4); *In re Giddigadu* (5).

A Full Bench of the Calcutta High Court, so far back as 1878, accepted this view in the case of *Empress v. Ashootosh Chuckerbutty* (2). The same conclusion has been expressed in the recent case of *Emperor v. Lalit Mohan Chukerbutty (Noni Gopal Gupta)* (6) by Jenkins, C. J., follows:

"The language of the section is guarded and the history of this Act leaves me in no doubt that this section was designedly framed in these terms. While admissions, a word which embraces con-

fessions, are by S. 21 relevant and may be proved as against the person making them, all that S. 30 provides is that the Court may take them into consideration as against other persons. This distinction of language is significant and it appears to me that its true effect is that the Court can only treat a confession as lending assurance to other evidence against a co-accused. Thus to illustrate my meaning in the view I take a conviction on the confession of a co-accused alone would be bad in law. This reading of the section appears to me to gain confirmation from the language of S. 5."

The Allahabad High Court also accepted this view in *Empress v. Bhawani* (7) and *Queen-Empress v. Nirmal Das* (8). It was suggested in the course of the argument that the Allahabad High Court has dissented from the view in the case of *Emperor v. Kehri* (9). In this case no reference is made to *Nirmal Das'* case (8) and as I read the judgments, I think that the observations of the learned Judges expressing their dissent from the view of law taken in the Calcutta Full Bench case were not necessary for the decision of the case. At any rate the fact remains that the Allahabad High Court has not definitely dissented from the views accepted by it in *Nirmal Das'* case (8).

So far as this Court is concerned it has consistently taken the view which has found favour with the Calcutta and Madras High Courts: see *Reg. v. Timava* (10) and *Queen-Empress v. Khandia bin Pandu* (1). So far as I know this Court has never allowed a conviction based entirely upon the confession of co-accused to stand. It was argued by the Government Pleader that the judgment in the *Nasik Conspiracy* case is not consistent with this view. I do not find anything in that judgment which can be said to be in conflict with the rulings of this Court. It shows that the confessions of accused were considered against other accused under S. 30 either as evidence or matter which may be taken into con-

(3) [1862-63] 1 M. H. C. R. App. 15.

(4) [1876-78] 1 Mad. 163=7 W. R. 740.

(5) [1909] 33 Mad. 46=1 I. C. 867.

(6) [1911] 33 Cal. 559=10 I. C. 582.

(7) [1875-78] 1 All. 664.

(8) [1900] 22 All. 445.

(9) [1907] 29 All. 434=(1907) A. W. N. 140=4 A. L. J. 310=5 Cr. L. J. 360.

(10) [1876] Unrep. Cr. C. 108.

sideration under the said section. The question whether the confessions of co-accused when taken into consideration under S. 30 could form the basis of a conviction in the absence of other evidence in the case apparently did not arise and was not considered in that case.

By the decisions of this Court I am bound. I may add however that I entirely agree with the decisions which broadly speaking accept the view adopted by this Court. In my opinion they lay down a safe and sound rule that no conviction based only upon matter which can be taken into consideration under S. 30 is good in law.

There is one more consideration to which I may advert. It is a significant fact that though by Act 3 of 1891 a proviso was added to S. 30 with a view to get rid of the effect of certain rulings such as *Reg. v. Amrita Govinda* (11) and *Badi v. Queen Empress* (12) nothing was done then nor has anything been done thereafter by the legislature to get rid of the effect of the rulings on this point by adding any proviso to that section or by adding appropriate words to S. 133, Evidence Act.

I do not consider it necessary to refer to the law relating to the evidence of an accomplice in connexion with this point. I may however add that Illus. (b) to S. 114, in my opinion, refers to the testimony of an accomplice. The other illustrations qualifying Illus. (b) also have reference to such testimony and have no bearing whatever on the present question relating to the confessions of co-accused to be taken into consideration under S. 30.

In this case there being no other evidence tending to the convictions of these appellants and the confessions of the co-accused being insufficient by themselves to justify these convictions I would allow this appeal.

Assuming for the sake of argument however that the confessions of the co-accused may form the basis of a legal conviction, I have to consider whether the confessions of the co-accused in this case corroborate one another in material particulars and prove beyond reasonable doubt that the appellants took part in the dacoity. The confes-

sions to be considered are made by accused 1 before the Committing Magistrate, by accused 2 and 5 before a Third Class Magistrate and adhered to before the Committing Magistrate, and by accused 3, 6, 7 and 8 before a Third Class Magistrate. Accused 3, 6, 7 and 8 retracted their confessions before the Committing Magistrate and adhered to their retractions in the Sessions Court. The other accused 1, 2 and 5 have retracted their confessions in the Sessions Court.

In the first place, as all the confessions are retracted, it is most unsafe to place any reliance on them against the co-accused. Secondly, it is clear in this case that these several accused were not arrested on the spot and the account which they give in their respective confessions is not an account given soon after the occurrence. If the dates on which these several accused were arrested, when they were brought to Islampur, and when all of them except No. 1 were taken to the Third Class Magistrate for having their confessions recorded, be carefully examined, it is clear that there is no guarantee in the present case that all the accused were kept separate and that they gave their accounts independently of one another. From the accounts which they give of the occurrence, and particularly of the persons who took part in the dacoity, I am unable to say that previous concert is highly improbable. None of these confessing co-accused is entitled to any particular consideration on the score of good character. In fact none of the conditions contemplated in the illustrations qualifying Illus. (b) to S. 114 is found to exist in the present case.

Further these statements have not been and cannot be tested by cross-examination and are not made on oath. I am unable to agree with the learned Sessions Judge when he says that in this case he has no doubt that any degree of cross-examination would only have confirmed the truth of the confessions. This is an assumption which it is easy to make but difficult to substantiate. I, for my part, am unable to say that cross-examination would have only confirmed the truth of the statements in this particular case.

(11) [1873] 10 B. H. C. R. 497.

(12) [1884] 7 Mad. 579.

Having regard to all these considerations, I am unable to place any reliance upon the confessions of the co-accused so far as they implicate persons other than those making the confessions. I do not consider it necessary to enter into a detailed consideration of these statements. After considering them carefully, I feel clear that they fail to establish, beyond reasonable doubt, that the present appellants took part in the dacoity.

I am of opinion therefore that the convictions and sentences should be set aside and the appellants (i. e., accused 4, 9, 10 and 11) acquitted.

(Owing to difference of opinion the case was laid before Macleod, J., who delivered the following judgment).

Macleod, J.—In this case eleven persons were tried jointly before the Sessions Judge of Bijapur sitting with assessors on a charge of dacoity. All were found guilty and sentenced to various terms of imprisonment.

Accused 4, 9, 10 and 11 preferred an appeal to the High Court which was heard by Heaton and Shah, JJ. The learned Judges having differed, the appeal has been referred to me for final decision.

It is admitted that there is nothing on the record which can be said to implicate the appellants in the dacoity, which undoubtedly was committed on 18/19th January 1913, except the confessions of the other seven persons who were tried jointly with the appellants. No. 1 confessed before the Committing Magistrate, Nos. 2 and 5 confessed before the Third Class Magistrate and the Committing Magistrate; Nos. 3, 6, 7 and 8 confessed before the Third Class Magistrate but retracted their confessions before the Committing Magistrate. Before the Sessions Judge, all confessions were retracted.

Section 30, Evidence Act, is as follows:

"When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such confession as against such other person as well as against the person who makes such confession."

It seems surprising that this section

which has given rise to so much discussion, so much conflict of judicial opinion as to its real meaning, should have continued to exist without amendment.

The confessions made by the co-accused affecting themselves and the appellants having been proved, the Court was entitled to take them into consideration as against the appellants.

It seems to me immaterial whether such a confession is called "evidence" or "matter." If anything that a Court may take into consideration to enable it to come to a conclusion whether the guilt of an accused person is proved, can be called evidence, then the confession is evidence, but that part of it which affects another accused is not evidence as defined by the Act, and the fact that it is included in the Magistrate's record of what the confessing accused admitted against himself, which is relevant, in my opinion, makes no difference.

It has been argued for the appellants that as a matter of law the Court could not convict on these confessions standing by themselves, that the confessions referred to in S. 30 must be unretracted confessions, and that in any event the section must be read as if it said that the confessions might only be taken into consideration along with other evidence against the accused.

I do not think that "confession" in S. 30 can be restricted to an unretracted confession, as once a confession is proved it may be taken into consideration. Nor do I think that words can be read into the section when there is nothing in the section to fetter the discretion of the Court, or that there is anything in the section itself which prevents a Court from convicting after taking the confession into consideration.

But I do think that the High Courts in India have, as they are clearly entitled to do, laid down rules of practice which deserve all the reverence of law, so that they ought to be observed by Judges when exercising their discretion under S. 30.

It was decided in this Court in *Queen Empress v. Khandia bin Pandu* (1) that a conviction founded solely on the confessions of co-accused could not be sustained. My brother Heaton has declined to follow that decision because the ratio decidendi was that the con-

fessions of the accused were not technically evidence within the definition of S. 3 of the Act, and this Court has since then repeatedly held that such confessions were evidence. But as I have already stated, if these confessions can be called evidence, it can only be by using the word "evidence" in a wider sense as meaning "any matter which the Court may take into consideration."

In my opinion, this decision laid down a definite rule of practice and not having been reversed by any later decision it is binding on me.

The confession of a co-accused stands on quite a different footing to the testimony of an accomplice, which the Evidence Act treats as having a higher probative value than similar evidence has according to English law. In England, it is a rule of practice that Judges should direct a jury to acquit unless they consider that the testimony of an accomplice is corroborated in material particulars by independent evidence. In India, a Judge is entitled to direct a jury that they may convict on the testimony of an accomplice without corroboration if they believe it, provided they are duly cautioned. Again the testimony of an accomplice may be corroborated by the accounts given by other accomplices, S. 114, Illus. (b): whereas in England the corroboration must be by independent evidence.

In my opinion, a Judge sitting with assessors ought never to convict an accused solely on the confession of a co-accused, since he has no materials before him to enable him to decide whether as against the accused it is true or false. If he is sitting with a jury he has a discretion, either to withdraw the confession from the jury, or to put it before them with the discretion that they ought to acquit unless it is corroborated in material particulars by independent evidence. It has been contended by the prosecution that seven co-accused in this case have made confessions before a Magistrate, affecting themselves and the appellants, and that, therefore, each confession has been corroborated by the others. I agree with my brother Shah, that S. 114, Illus. (b), only applies to the testimony of an accomplice given on oath before the Court and not to confessions before a Magistrate. Once it is laid down that a Court

ought not to convict on the confession of the co-accused, it follows that it ought not to convict, however many of the co-accused have confessed. I agree with my brother Shah that the convictions and sentences should be set aside and the appellants acquitted.

Rupees 240 taken from accused 4 to be returned to him.

G.P./R.K.

Appeal allowed.

A. I. R. 1914 Bombay 311

SCOTT, C. J. AND BEAMAN, J.

Appaji Bharmappa—Defendant—Appellant.

v.

Thalegauda Satyappa — Plaintiff — Respondent.

Second Appeal No. 661 of 1913, Decided on 20th July 1914, from decision of Asst. Judge, Belgaum, in Appeal No 134 of 1912.

Dekkan Agriculturists' Relief Act (1879). S. 48 — In computing period of limitation time to be excluded under S. 48 must be reckoned by days.

The plaintiff's possessory suit in the Mamlatdar's Court having been dismissed on 28th September 1906, he applied on 24th September 1909 for a conciliator's certificate which was issued to him on 24th August 1910. He then filed the present suit on 29th August 1910 to recover possession of the land.

Held: that in computing the period of limitation the time to be excluded according to S. 48, must be reckoned by days, and even excluding the days between the day of the application and the day of the grant of the certificate, the plaintiff's suit was barred by time.

[P. 312 C 1]

*M. N. Bhat—*for Appellant.

*G. K. Parekh—*for Respondent.

Judgment.—We are of opinion that the suit (which was filed on 29th August 1910) is barred by limitation. The mamlatdar's order was passed in favour of the defendant for possession on 28th September 1906, and from the date of that order the plaintiff had three years to sue. He did not however sue within three years, but just before that period expired applied to the conciliator for a certificate under Chap. 6, Dekkhan Agriculturists' Relief Act. His application was made on 24th September 1909, and the conciliator's certificate was issued on 24th August 1910. S. 48, Dekkhan Agriculturists' Relief Act, says: "In computing the period of limitation prescribed for any such suit or application the time intervening between the application made by the plaintiff under S. 39

and the grant of the certificate under S. 46 shall be excluded." We have recently held, and it is also conceded in argument, that the time to be excluded must be reckoned by days, and the days between the day of the application and the day of the grant of a certificate are therefore to be excluded under S. 48. If those days are excluded, the plaintiff is out of time by three days. The suit is therefore barred without reference to the question whether he can file the suit on a Monday if the time expired on a Sunday. We therefore allow the appeal and dismiss the suit with costs throughout upon the plaintiff.

G.P./R.K.

*Appeal allowed.***A. I. R. 1914 Bombay 312 (1)**

BEAMAN AND HAYWARD, JJ.

Sitabai Raghunath Karmarkar —
Plaintiff—Appellant.

v.

Shambhu Sonu Gajana and others —
Defendants 1 to 3 and 6—Respondents.

Second Appeal No. 54 of 1913, Decided on 7th July 1914, against decision of acting Dist. Judge, Ratnagiri, in Appeal No. 584 of 1911.

Transfer of Property Act (1882), S. 108 (h)—Permanent tenant planting trees — He can cut and use them.

A permanent tenant who has planted trees upon his lands is entitled to cut them down and use them. [P 312 C 1, 2]

Jayakar and P. D. Bhide—for Appellant.

Coyaji and V. B. Desai— for Respondents 1 to 3 and 6.

Judgment. — The only question argued before us is whether the defendants, who are found to be permanent tenants, have a right to cut trees upon the lands demised. The plaintiff is found to be the owner of the lands, but the tenants, upon the principle stated in S. 83, Land Revenue Code, are found to be the permanent tenants, that is to say, the origin of their tenancy is lost in antiquity. The dispute between the plaintiff and the defendants now centres upon the right of the defendants to cut down trees, which ex concessis and by the admission of the plaintiff they have themselves planted. In these circumstances we entertain no doubt whatever but that the defendants have the right which they claim. The English Law of fixtures and the principle upon which it is based have no general applicability in

this country. Therefore before the passing of the Transfer of Property Act, which deals expressly with circumstances like these, we must be referred, in the absence of any special usage, to what we conceive to be principles of equity, justice and good conscience, and none of those in our judgment compel us to say that a permanent tenant who has planted trees upon his lands is precluded from cutting down and making use of them. It is unnecessary to discuss the numerous cases to which we have been referred, since the principle of our judgment is very simple, very clear, and has since found legislative sanction in S. 108, Cl. (h), T. P. Act. It has been contended that that section does not apply to agricultural leases, and we are not supposing that it does, but we do think that the principle to which it gives expression are principles which, for the most part, were good law in respect of the facts covered by them before they found legislative expression in the Transfer of Property Act, and among such would certainly be the principles upon which we found our decision here. We think therefore that the decree of the lower appellate Court must be confirmed and this appeal dismissed with all costs.

G.P./R.K.

*Appeal dismissed.***A. I. R. 1914 Bombay 312 (2)**

SCOTT, C. J. AND BATCHELOR, J.

Andrew Yule & Co.—Plaintiffs—Appellants.

v.

Ardeshir Bomenji Dubash and another —
Defendants—Respondents.

Original Civil Appeal No. 25 of 1913 and Suit No. 1 of 1913, Decided on 22nd September 1913 from decision of Beaman, J., in Civil Suit No. 1 of 1913, D/- 27th March 1913.

(a) **Contract — Shipping — Charter party agreement for successive charter-parties but pro forma charter-party handed with regard to one voyage, with guarantee of subsequent similar charter-parties—Agreement for whole contract is completed on day on which negotiations are completed and failure to specify lay and cancelling dates does not make contract incomplete nor would non-performance of one end whole contract.**

Where a ship has been engaged for successive charter-parties but pro forma charter-party handed over with regard to one or more of the voyages, with a guarantee that similar charter-parties will hold good for the successive voya-

ges the agreement for chartering is deemed to be completed on the day on which negotiations are completed and the mere fact that the lay and cancelling dates had not been specified in the charter-parties will not make the contract incomplete, nor will the non-performance of one charter-party put an end to the whole contract. [P 315 C 1]

(b) Contract—Shipping — Charter-party—Mortgage of ship cannot ordinarily interfere with prior contracts.

A mortgage of a ship cannot interfere with the prior contracts for the employment of the ship unless such contracts prejudice the security. This is much more so in the case of mortgagee with notice of such contracts and the onus of proving the prejudice is on the mortgagee. [P 316 C 2]

(c) Transfer of Property Act (1882), S. 54—Effect of sale by person in one's own favour—Contract Act (1872), S. 55.

A sale by a person to himself is no sale at all, and a power of sale does not authorize the donee of the power to take the property subject to it at a price fixed by himself, even although such price be the full value of the property. Such a transaction is not an exercise of the power and the interposition of a trustee, although it gets over the difficulty so far as form is concerned, does not affect the substance of the transaction. [P 316 C 2]

(d) Contract—Shipping — Charter-party—Agreement to let ship—Implication.

An agreement for the letting of a ship to a certain charterer implies that she shall not, during the currency of the charter-party, provided the charterer is ready to supply cargo, be employed for any other person or purpose. [P 318 C 1]

(e) Specific Relief Act (1877), S. 57—Charter-party—Provision qualifying implied negative by condition subsequent.

A charter-party giving the use of a ship contained a provision that "owners are to have the privilege of substituting another steamer of the same class and similar size, position and tonnage."

Held: that the provision merely qualifies the implied negative by condition subsequent, and if the condition was not fulfilled, the negative implied was enforceable by injunction under S. 57. [P 318 C 1]

Weldon and Jardine—for Appellants.

Setalvad and Desai—for Respondents.

Judgment.—The plaintiffs who are agents of the Bengal Coal Company are engaged as such agents in an extensive coal trade between Calcutta and Bombay supplying coal from the Bengal collieries to the many users of coal for industrial purposes in Bombay.

This trade is continuous throughout the year and it is not disputed that it is common to charter steamers for the trade for as many as twelve consecutive voyages.

On 17th November 1911 the agents of defendant 3 wrote to the plaintiffs' agent in Bombay :

" With reference to your call this morning and the conversation we had regarding coal-supplies and steamers, I now have to inform you that the owners of the "Gymeric" are ready to charter the steamer to your firm provided suitable terms can be arranged. The position of the steamer and particulars for the charter are briefly as follows :—"Gymeric" should be ready at Calcutta in ballast from Re-union from 10th to 20th December. Capacity for about 6,500 tons Bengal Coal. Charter-party usual terms. Available for full cargo from Calcutta to Bombay and will consider question of larger charter on expiration of voyage. "Gymeric" is a first class steamer and registered in Bureau Veritas. "

On 18th the plaintiffs' Calcutta principals wired that they could take Gymeric on twelve voyages at Rs. 5 per ton. On 22nd defendant 3's agents wrote to plaintiffs' agent in Bombay :

" With reference to your Mr. Young's call on me this morning and subsequent telephone, I now have to confirm the charter of the steamer (Gymeric) for twelve voyages with coal from Calcutta to Bombay at Rs. 5-2-0 per ton; the steamer will be ready at Calcutta to load for her first trip between 10th and 20th December pro forma. Charter-party will be sent to you in a day or two the terms being usual. "

These terms were agreed to by the plaintiffs' principals on 25th November. On 29th November defendant 3's agents wrote to plaintiffs :

" I have now the pleasure to hand you a pro forma copy of the charter-party of the Gymeric for the voyage from Calcutta to Bombay. It is of course understood that a similar charter-party will hold good for eleven more voyages to take place consecutively. "

On 15th December the twelve charter-parties for twelve consecutive voyages were signed by the parties. Defendant 3's agents when forwarding them for signature wrote that the cancelling dates for the eleven following voyages were left blank and were to be filled in after the completion of each voyage, it being understood that the plaintiff would accept such a date for lay days to commence in Calcutta as would enable the owner to commence the voyage as soon

as possible after the previous one was completed.

The ship was used under four successive charter-parties but owing to the intervention of mortgagees, named A. M. Jivanji & Co., and to other complications which subsequently arose, the plaintiffs were unable to obtain the use of the ship under the remaining eight charter-parties.

At the beginning of July 1912 before the fourth charter-party had been performed, the mortgagees, A. M. Jivanji & Co., sued defendant 3 in this Court to recover Rs. 2,06,481-2-0 by sale of the ship and for interim possession of the same, and on 8th July a receiver was appointed of the steamer and the freight to become due.

On 31st August the plaintiffs having unloaded the vessel in Bombay after her fourth voyage sued A.M. Jivanji & Co and the receiver on the allegation that they were apprehensive that the mortgagees intended to induce the receiver to avoid the remaining charter-parties and deal with the steamer in derogation thereof, and claimed an injunction restraining them from dealing with the vessel in any manner inconsistent with the remaining eight charter-parties.

That suit came to a hearing and was dismissed on 7th October 1912 on the ground that there was no evidence that the defendants intended to deal with the steamer in violation of the eight charter-parties.

On 11th October a decree was by consent passed in the mortgagees' suit for Rs. 2,11,001 giving liberty to the mortgagees to sell the steamer when and as they should think fit in satisfaction of the decree.

On 25th October the plaintiffs' attorneys sent the mortgagee's attorneys a notice warning them that any sale would be subject to the eight charter-parties still to be performed and a copy of this notice was on the same day forwarded by the mortgagees' attorneys to Messrs. Bicknell, Merwanji, Romer & Co., as attorneys for the intending purchaser. The mortgage of A. M. Jivanji & Co., and the decree obtained by them were on 28th October transferred by endorsement to defendant 4, shroff for Rs. 2,15,000. By an agreement also bearing date 28th October and made between defendant 4 and defendants

1 and 2 it was witnessed that if the defendant 4 should succeed in obtaining a transfer of the mortgage of A. M. Jivanji & Co., and of their decree he would sell and defendants 1 and 2 would buy the Gymeric at a price exceeding by Rs. 5,000 the amount paid to the mortgagees for obtaining the transfer, and that the defendants 1 and 2, should advance to defendant 4, Rs. 2,20,000 to enable him to obtain the transfer and that the transaction should be completed as soon as the vendor should obtain the transfer and that in anticipation of the completion of the sale the vendor should execute a bill of sale in favour of the purchasers as an escrow and that he should as soon as he obtained possession of the steamer put the purchaser in possession thereof.

On the same day defendant 4 wrote to the master of the Gymeric asking him to hand over possession of the Gymeric to defendants 1 and 2, they having purchased the steamer from him. The vessel was thereafter despatched from Bombay to Calcutta by the defendants or some of them where she loaded a cargo of coal for another firm of coal-shippers in Calcutta and having returned to Bombay was fixed by defendants 1 and 2 for December January loading to Genoa at 23/5 d. a ton.

This suit was instituted by the plaintiffs on 3rd January 1913 claiming an injunction against the defendants restraining them until the completion of the eight remaining voyages from dealing with the vessel in any manner inconsistent with or which might interfere with or prevent the execution of the agreement of 22nd November and the remaining charter-parties.

None of the facts above stated are in dispute.

The respondents however who are defendants 1 and 2 contended, first there never was any completed agreement for chartering for twelve voyages; that if there was, its date was 15th December and not 22nd November, and even then the completed contract was for only one voyage and that none of the remaining eight charter-parties are complete contracts because the lay and cancelling dates have not been specified in any of them.

Secondly, that a dispute in December 1911 led to the cancellation of the agree-

ment of chartering of 22nd November to which the charter parties were merely complementary.

Thirdly, that defendants 1 and 2, even though they may have purchased with notice of the agreement and charter-parties, took a title unincumbered by them inasmuch as they have acquired that of A. M. Jivanji & Co. who had no notice.

Fourthly, that the plaintiffs are estopped from claiming relief in this suit by the dismissal of the suit against A. M. Jivanji & Co.

Fifthly, that no injunction can be granted against them having regard to the provisions of the Specific Relief Act and the case law relating to charter-parties.

On the first point we agree with the learned trial Judge that the agreement for chartering was complete on 22nd November when defendant 3, by his agents' letter accepted the proposed charter of the steamer for twelve voyages with coal from Calcutta to Bombay at Rs. 5-2-0 per ton and that the lay and cancelling dates which are inserted solely for the protection of the charterer, must be left open until each voyage in turn had been duly completed. Even if they were not inserted in the last eight charter-parties the Court would have no difficulty in holding that the lay days commence with a reasonable date of the arrival of the ship in the port of loading and the cancelling date within a reasonable time thereafter. The parties indicated in the first charter-party what dates would be reasonable and adhered to the same measure of reasonableness in the three subsequent charter-parties which were performed.

On the second point we agree with the learned Judge that the contract consisted of 12 parts and that non-performance of one would not necessarily indicate an intention to put an end to the whole contract. It is clear that defendant 3 did not regard notice of cancellation in respect of the first charter-party as putting an end even to the part of the contract, but it was understood to mean that the charters would not load after the cancelling date in December unless the steamer was held at their disposal until such date in January as they could load—this

difference was adjusted and the loading began on 12th January. We do not think that in the circumstances the limit of the plaintiff's rights was eleven voyages only as held by the learned Judge.

On the third point we have no doubt that Jivanji & Co. took the mortgage of 6th December with full knowledge of the agreement between the plaintiffs and defendant 3 of 22nd November. His knowledge has been deposed to by the plaintiff's manager, Clarke, and also by defendant 3 in an affidavit of 12th April 1912. Defendant 3 and Jivanji were occupying the same office rooms and in constant contact. Jivanji's firm was actually stevedoring for defendant 3 and Jivanji's agent in Calcutta was also the ship's agent in that place. Jivanji himself has not been called to contradict Clarke's statement.

The fourth point of estoppel by judgment has no substance. The plaintiff's suit against the mortgagees was dismissed on a different state of facts: the issue now arising between the plaintiff and the defendants was not heard and finally determined in that suit nor could it have been raised therein.

The fifth point is that raised by the plaintiffs' appeal against the decree of the lower Court which merely directed an inquiry as to damages against defendant 3 and refused the claim for an injunction.

It was contended in the lower Court that defendants 1 and 2 before acquiring an interest in the steamer had no notice of the plaintiffs' agreement and charter-parties, but no argument has been addressed to us challenging the conclusion of the learned Judge and upon the evidence we are satisfied of the correctness of the finding that notwithstanding the sworn denials of defendant 1, defendants 1 and 2 acquired their interest with express notice of the plaintiffs' rights. There is some obscurity as to the exact relations of defendant 3, Gulam Hussein, and defendants 1 and 2 before the assignment by A. M. Jivanji & Co., of their rights under the mortgage and decree. According to the evidence in cross-examination of Merwanji, the solicitor, he was trying to free Gulam Hussein, his client, from the claims of Jivanji and another creditor and second mortgagee

named Badridas and proposed to purchase the steamer from Jivanji for Gulam Hussein at Rs. 2,51,000 (in order to top another offer of Rs. 2,50,000); the difference between Rs. 2,15,000, the mortgagees' claim and Rs. 2,51,000 was to be paid by Gulam Hussein to Badridas as second mortgagee and Badridas was to take hundies for the balance of his claim thus leaving the ship in the hands of Gulam Hussein. This proposal was eventually rejected by Badridas' solicitor on 24th October. Merwanji's diary shows that from 11th October the date of the consent decree in Jivanji's suit the solicitors of defendants 1 and 2 were taking part in the negotiations for purchase and then Gulam Hussein disappeared from the position of an open party to them not earlier than 26th October. On 28th Darasha Shroff, defendant 4, appears in Merwanji's diary as his client in place of Gulam Hussein. On 22nd October defendants 1 and 2 gave a cheque for Rs. 2,15,000 (the amount Jivanji would be satisfied with) to Merwanji who was acting for Gulam Hussein, but Merwanji does not mention it in his diary. In his affidavit of 7th January 1913 defendant 1 says that the cheque was handed to Merwanji to enable defendant 4 Shroff to complete the transfer from Jivanji to himself, but it is clear from Merwanji's letter to Payne & Co., of 23rd October despite Merwanji's attempted explanation that Gulam Hussein was then the intending purchaser. In cross-examination defendant 1 very unwillingly admitted that Rs. 2,15,000 represented by the cheque had been supplied to him by someone else. The money was returned by Merwanji on 26th October.

In an undated letter signed by defendant 4 Shroff, attested by Merwanji and addressed to defendants 1 and 2, defendant 4 declares that in the matter of the purchase of the ship from the mortgagees he is merely the nominee and agent of defendants 1 and 2. Defendant 1 in the affidavit incorporated in his written statement says this letter was given to him on 22nd October. This seems unlikely having regard to Merwanji's letter of 23rd and the entries in his diary. It is impossible to extract the exact truth from the evidence on this part of the case which the learned Judge has

characterised not too strongly as a squalid tissue of lies. We agree with him in his conclusion that the fact was that Darasha Shroff, who was admittedly the mere agent and conduit pipe of the funds of defendants 1 and 2, was in the intimate confidence of the owner of the vessel and the whole transaction was doubtless initiated by Gulam Hussein to get the ship out of the hands of Jivanji.

Having arrived at this conclusion we will consider the present legal position of defendants 1 and 2. Are they mortgagees or are they owners?

In taking the transfers from Jivanji, the Shroff was merely their agent and he filled the same position when he executed the bill of sale.

In *Farrar v. Farrars* (1) Lindley, L. J., said: "A sale by a person to himself is no sale at all, and a power of sale does not authorize the donee of the power to take the property subject to it at a price fixed by himself, even although such price be the full value of the property. Such a transaction is not an exercise of the power and the interposition of a trustee, although it gets over the difficulty so far as form is concerned, does not affect the substance of the transaction."

Defendants 1 and 2 are therefore mortgagees and nothing more. Putting their rights as mortgagees at their highest, they can only interfere with the contracts for the employment of the ship if they prejudice the security and if no such prejudice is shown, they will be restrained from interfering with the performance of the charter-parties. This results from the statutory position of mortgagees of ships: see *Collins v. Lamport* (2). Defendants 1 and 2 in para. 23 of their written statement submit that the agreement of 22nd November 1911 was invalid against their predecessors-in-title as depreciating their security and was therefore, invalid against the defendants, but no issue was raised nor was the learned Judge invited to deal with this point in the lower Court. The onus is on the mortgagees: see *The Fanchon* (3), and they

(1) [1888] 40 Ch. D. 395 at p. 409 = 58 L. J. Ch. 185 = 60 L. T. 121 = 37 W. R. 196.

(2) [1865] 34 L. J. Ch. 196 = 11 Jur. (n. s.) 1 = 11 L. T. 497 = 13 W. R. 283.

(3) [1880] 5 P. D. 173 = 50 L. J. Adm. 4 = 42 L. T. 483 = 29 W. R. 339 = 4 Asp. M. C. 272.

have not discharged it. We are therefore of opinion that on this ground the plaintiffs are entitled to the injunction asked for against defendants 1 and 2.

The plaintiffs' position as against the mortgagees is however, stronger than that of the plaintiff in *Collins v. Lamport* (2) where the mortgage was prior to the charter-party, for here the mortgage to Jivanji was subsequent to the agreement of 22nd November for the hiring of the ship by the plaintiff and he took with notice of it and defendants 1 and 2 took their assignment of the mortgage with full notice of the plaintiffs' rights. The learned Judge has very reluctantly refused an injunction against these defendants because he considered that the plaintiff could stand in no better or different position as against them than or from that which he occupied in regard to Gulam Hussein, the owner, against whom (in our judgment erroneously) he thought he could not legally grant an injunction.

The judgment of the Lord Chancellor in *De Mattos v. Gibson* (4), by which the learned trying Judge was chiefly influenced, shows that, while the question as against the owner of the ship was whether the plaintiff, though not entitled to specific performance, might not nevertheless be entitled to an injunction to restrain a breach of the contract contained in the charter-party, the question as against the mortgagee was whether the charterer of the vessel might not be entitled to the benefit of the equity which (the owner) Curry might have against Gibson, the mortgagee, to prevent his committing or compelling a breach of the contract. "Gibson," he says, "as the mortgagee, though with full notice of the charter-party, incurred no liability in respect of the contract with the plaintiff (charterer), nor was he bound to do anything to forward its performance," and again, "Gibson's position is entirely different from Curry's. He is not bound by any engagement to the plaintiff. It is true that he took his mortgage with a full knowledge of the charter, and that he must, therefore abstain from any act which would have

the immediate effect of preventing its performance."

In *Johnston v. Royal Mail Steam Packet Co.*, (5), Willes, J., in delivering the judgment of the Court, said: "The case of the mortgagees and mortgagors of the ship appears to be one quite of a different complexion (from that of mortgagees of land), because the mortgagees may fairly be taken, so long as they do not interfere and claim the possession, to have allowed the mortgagors to enter into all engagements for employment of the sort usually entered into by a person who has the apparent control and ownership of a vessel; and as they would unquestionably be bound (the mortgage being subsequent to the arrangement of September 1857) by any creation of an interest under that contract prior to their mortgage, so we think it is just to conclude, under the circumstances of this case, and looking to the terms of their notice of 10th August 1858, that they were, and meant to be, and assented to be actually bound by the arrangement made by implication between the European and Australian Company in continuation of the contract of September 1857, just as they were in respect to any interest created by that contract prior to the mortgage."

In the *Law Guarantee and Trust Society v. Russian Bank for Foreign Trade* (6), the Court appears to have thought that the doctrine of *Collins v. Lamport* (2) would not necessarily apply where the charterer-party sought to be invalidated by the mortgagee was made previously to the mortgage. The position of the charterer where the mortgagee took his security with notice of charter-party would be much stronger. That is the plaintiffs' position here.

It remains to consider whether an injunction should also be granted against defendant 3, Gulam Hussein. He has stated on solemn affirmation that he has now no interest in the ship. He is, however unscrupulous and unreliable. In the view we take of the position of defendants 1 and 2 he must be treated for the purpose of the case as still the owner. The Statute Law relevant to

(4) [1859] 4 D. G. & J. 276 at pp. 295, 299=28 L. J. Ch. 165 (498)=5 Jur. (n.s.) 347 (555)=7 W. R. 100, (152), (403), (514)=45 E. R. 108=124 R.R. 250.

(5) [1867] 37 L. J. C. P. 33 at p. 46=L. R. 3 C.P. 38=17 L.T. 445.

(6) [1905] 1 K. B. 815=74 L. J. K. B. 577=92 L.T. 435=10 Com. Cas. 159=60 Asp. M.C. 41=21 T.L.R. 383.

the question is contained in the Specific Relief Act, S. 21 of which enacts that certain classes of contracts cannot be specifically enforced, namely, (b) contracts which run into minute or numerous details or from their nature are such that the Court cannot enforce specific performance of their material terms, and as an illustration to Cl. (b) the instance is given of a charter-party whereby it is agreed that a ship shall proceed to Rangoon to load a cargo of rice and take it to London for a certain freight. This is a re-enactment of the English Law. It shows that specific performance cannot be decreed of the plaintiffs' charter-parties. S. 56 deals with perpetual injunctions and Cl. (f) provides that an injunction cannot be granted to prevent the breach of a contract which would not be specifically enforced. This again, speaking generally is a statement of the English Law.

Section 57 provides that notwithstanding S. 56, Cl. (f), where a contract comprises an affirmative agreement to do a certain act, coupled with a negative agreement, express or implied, not to do a certain act, the circumstance that the Court is unable to compel specific performance of the affirmative agreement shall not preclude it from granting an injunction to perform the negative agreement.

It has for many years been held that an agreement for the letting of a ship to a certain charterer implies that she shall not during the currency of the charter-party, provided the charterer is ready to supply cargo, be employed for any other person or purpose; see *De Mattos v. Gibson* (4).

The learned Judge however thought that in the circumstances of the case the negative could not be implied because each of the charter-parties giving the use of the Gymeric to the plaintiffs contains a provision that "owners are to have the privilege of substituting another steamer of the same class and similar size and position not exceeding 6,500 tons." This it appears to us merely qualifies the implied negative by condition subsequent. If the condition is not fulfilled the negative, implied upon the authority of *De Mattos v. Gibson* (4) and many other cases, is enforceable by injunction under S. 57. An injunction granted in the terms of

the prayer will not prevent the defendants from exercising their option to substitute another ship for the Gymeric if it is convenient for them to do so in terms of the charter-parties. The evidence, however, shows that Gulam Hussein at no time had at his disposal another steamer similar to the Gymeric.

It has been argued that the illustrations to S. 57 indicate that an injunction should not be granted when it is not required to preserve the plaintiff from the competition of a rival, but we have in this case evidence that the very first employment on which the Gymeric was sent after the transfer to defendants 1 and 2 was a voyage to Calcutta to bring a cargo of coal to Bombay for a shipping firm who are competitors of the plaintiffs in the Calcutta-Bombay coal trade.

For the above reasons we set aside the decree and pass a decree for an injunction against all the defendants in terms of the prayer of the plaint and the defendants must pay the costs throughout.

G.P./R.K.

Decree set aside.

A. I. R. 1914 Bombay 318

BEAMAN AND HEATON, JJ.

Manjunath Subrayabhat—Plaintiff—Appellant.

v.

Shankar Manjaya Apartha—Defendant—Respondent

Second Appeal No. 574 of 1912, Decided on 8th July 1914, against decision of Dist. Judge, Kanara, in Appeal No. 32 of 1911.

Hindu Law—Joint family—Vritti can be alienated only under special case and conditions when supported by local usage.

The general rule is against the alienability of vrittis. They may only be alienated in special condition, provided that such alienations can be supported by local usage and custom. [P319 C 1]

S. S. Patkar—for Appellant.

Judgment.—The property in question in this suit is a vritti. The plaintiff claims to be the alienee of three-quarters of the cash allowance paid for the due performance of ceremonies and the worshipping of the idol. The first Court held that the alienation was good and decreed the plaintiff's claim. On appeal the learned Judge remanded certain issues inviting an inquiry into any local custom which would justify

the alienation of such a peculiar right as this, to one who was not a member of the original family which enjoyed the priestly privilege. The findings on the remanded issues were all against the plaintiff. His suit was accordingly dismissed.

On appeal it has been strenuously contended that the learned Judge of first appeal adopted a wrong method. It is said that the general principle is that vrittis are alienable to suitable persons, unless a local custom to the contrary or some prohibition by the founder can be proved. This certainly does appear to be the effect of Melvill, J.'s decision in the case of *Mancharam v. Pranshankar* (1). On the other hand there is a much later decision by Ranade, J., in the case of *Rajaram v. Ganesh* (2), which, in our opinion, states both the underlying principle and method of dealing with cases like this more correctly. It is true that in that judgment the learned Judge refers with seeming approval to the case of *Mancharam v. Pranshankar* (1), but the principle he lays down is that the general rule is against the alienability of vrittis. Vrittis may be alienated in special cases and under special conditions provided that such alienations can be supported by local usage and custom. That this was his ground is clear enough from the issues which he framed and remanded for trial. The learned Judge of first appeal appears to have followed exactly the course adopted by the learned Judges in *Rajaram v. Ganesh* (2), and having regard to the character of these huks and the desirability of preventing too free alienations of what in essence is a sacred and personal right, we are not prepared to say that the learned Judge of first appeal was wrong. We therefore think that his decree must now be confirmed and this appeal dismissed.

G.P./R.K.

Appeal dismissed.

A. I. R. 1914 Bombay 319

SCOTT, C. J., AND CHANDAVARKAR, J.

Burjorji Ruttonji Bomanji and others
—Defendants—Appellants.

v.

Bhagvandas Parashram and others—
Plaintiffs—Respondents.

Civil Appeal No. 74 of 1912, Decided 28th March 1913, from judgment of Beaman, J. in Civil Suit No. 272 of 1911, D/- 24th October 1912.

Contract Act, (1872), S. 30—Defence of wagering contract—Business of contracting parties and surrounding circumstances must be examined.

In all cases where the defence of wagering contract is set up, the business of the contracting parties and the surroundings of the case must be examined. [P 320 C 1, 2]

The plaintiffs averred as follows:

(1) That they were the pakki adat agents of the defendant:

(2) That the defendant having instructed the plaintiffs to sell 4,000 tons of linseed on his account, they had sold on his behalf the whole amount of linseed to 39 buyers under covering contracts:

(3) That the defendant having failed to give delivery of linseed on the appointed date the plaintiffs had to purchase 300 tons for ready delivery on defendant's account and also had to pay the various buyers the differences due on 3,700 tons.

On the above allegations, the plaintiffs as pakka adatis sued to recover from the defendant more than ninety thousand rupees. The defence was that the transaction was a wagering transaction and, therefore, the sum claimed could not be recovered.

Among others, the following facts and circumstances appeared in the case:

(1) The plaintiffs dealt largely in cotton but only to a small extent in linseed...on an average they did not receive from their constituents in Bombay more than 150 tons of linseed in the year.

(2) By another contract entered into about three months before the linseed transaction, the defendant had agreed to purchase from the plaintiffs 2,000 bales of cotton. But that contract was closed between the parties without any delivery having taken place.

(3) Plaintiffs had resorted to their solicitors for intervention in very trivial matters relating to the linseed transaction.

(4) The plaintiffs admitted that the purchase of 300 tons for ready delivery was done for the purpose of the Court's proceedings.

(5) All the thirty-nine covering contracts were in the same form and in each case there was the condition "not to be delivered to Mrs. N. R. & Co., a firm which always insisted on delivery of produce contracted for being large exporters:

Held: (1) that there was no privity between the defendant and the thirty nine buyers:

[P 323 C 2].

(1) [1881-82] 6 Bom. 298.

(2) [1899] 28 Bom. 131.

(2) that the sub-contracts, considering their conditions were not sufficient indication of an intention on the part of the plaintiffs to call for delivery from the defendant.

(3) that all other circumstances pointed to the conclusion that the common understanding was that the defendant and the plaintiffs should deal in differences and settle in that way:

(4) that the contract was a wagering contract and that, consequently, plaintiffs' suit must be dismissed. [P 324 C 1, 2]

Strangman and Davar — for Appellants.

Jinnah and Jayakar — for Respondents.

Judgment.—This suit was brought by the plaintiffs, a firm of Marwari merchants, who act, *inter alia*, as *pakka adatias*, to recover from the defendant Rs. 90,763-14-6 and interest as the amount due by the defendants to the plaintiffs as his *pakka adatias* in respect of certain contracts in cotton and linseed.

The defence was that the transactions were wagering transactions and therefore the sum claimed could not be recovered; the defendant also counter-claimed re-payment of two sums of Rs. 50,600 and Rs. 10,400 deposited by him, as he alleged, as fixed deposit but as the plaintiffs alleged as margin-money or security in respect of the contracts above mentioned.

The only contract in cotton was dated 30th June 1910. It was for the purchase by the defendant from the plaintiffs of 2,000 bales of Broach Cotton for March 1911. The market went in the defendant's favour and the contract was closed for Rs. 5,804-2-3 without any delivery taking place. The defendant has received credit in the account sued on for this sum. The linseed contracts are as follows:

One dated 1st July 1910, for the sale by the defendant to plaintiffs of one thousand tons of linseed at Rs. 11-5-0 per cwt. Another of 6th July 1910 for the sale by the defendant to the plaintiffs of 800 tons at rates varying from Rs. 11-10-0 to 11-10-9 per cwt. The plaintiffs further allege that the defendant orally agreed to sell them a further 2,200 tons of linseed on 10th July 1910.

Applying the recognized rule in all cases where the defence of wagering contract is set up, the business of the con-

tracting parties and the surrounding circumstances of the case must be examined.

The plaintiffs are Marwari Shroffs and merchants in a large way of business who deal largely in cotton as merchants and commission agents but only to a small extent in linseed. They receive from constituents for sale in Bombay on an average not more than 150 tons of linseed in the year. The defendant is a Parsi 29 or 30 years of age who has never had any regular business. In September 1909, he won a St. Ledger Sweep of about a lakh and a quarter and thereafter entered into cotton speculation on American futures and fine Broach through the agency of Messrs. Bruel & Co. after depositing margin-money with them. The transactions proved unprofitable but after paying his losses he received back from Bruel & Co. the balance of his margin-money in two sums, Rs. 45,000 and Rs. 10,161. This was at the end of June 1910. At that time, it is proved that defendant and Hargopal, the plaintiffs' then Munim, used constantly to meet in the evening at Chowpatty and the defendant says Hargopal suggested he should deal in linseed in differences and settle in that way. Business eventually commenced between the parties on 30th June with the cotton contract above-mentioned. On 1st July, the defendant signed a letter stating he had given Rs. 50,600 on the previous day and Rs. 10,400 that day to be retained at interest as security against business in cotton and linseed. On 30th August 1908, the parties went together to Mrs. Tyabji Dayabhai and Co., the plaintiffs' solicitors, where the managing clerk drafted a letter for the signature of the defendant. It ran as follows:

"With reference to the 4,000 tons of linseed sold by you as my *pakka adatias* for September 1910 delivery, I have to request you to purchase on my account from the bazar 250 tons of ready linseed for the present and deliver the same against the contracts made by you on my behalf. The value of the 250 tons so to be purchased on my account should be debited to my account and I will pay interest on the same at 7 annas per cent per month; all other usual charges will be allowed."

The defendant, however, declined to sign it. It seems strange that a simple request to the agent to carry out a small part of a pending contract should necessitate the intervention of solicitors. There can, we think, be no doubt that the letter was intended to create evidence from which might be inferred the genuineness of the contract which would fail to be performed or settled in the following month. On the following day the solicitors were again requisitioned and produced another draft in the following terms.

"We are instructed by our clients Messrs. Bhagwandas Parashram to state that they, as your pakka adatias under your instructions and orders received from you on or about the respective dates mentioned below, sold 4,000 tons of linseed as under at the rates mentioned below, 1,000 tons on Ashad Bud 9 (1st July 1910) at Rs. 11-5-0 per cwt; "800 tons on Ashad Bud 15 (6th July 1910) viz., 500 tons at Rs. 11-10-0, 100 tons at Rs. 11-10-9; "100 tons at Rs. 11-10-6 and 100 tons at Rs. 11-10-7½ and deliverable in September 1910; that the time to deliver the said 4,000 tons of linseed begins from tomorrow and according to the practice of the Bombay market the option to deliver the goods lies with sellers i. e., to deliver the goods by us issuing delivering orders from the commencement of the due date. We are therefore instructed by our said clients to call upon and require you to supply to our clients the quantity of linseed agreed to be sold by you to enable our clients to carry out your aforesaid sales or to give our clients the necessary instructions to purchase as much quantity of ready linseed from the Bombay market and then to deliver the same against the sales effected by them on your behalf. We are also instructed to state that our clients undertake not to buy ready linseed or settle business without your mutual consultation or without your written consent in that behalf.

"Our clients also inform us that they have on 1st July last received from you Rs. 61,000 as a loan or as a deposit against the transactions and it has been agreed that interest at 7 annas per cent per mensem is to run on the account between you and them."

A reply was also drafted for the defendant by the solicitors which the defendant did sign. It ran thus:

Bombay, 31st August, 1910.

Messrs. Tyabji Dayabhai & Co.

Attorneys for

Messrs. Bhagwandas Parashram.

Dear Sirs,

I beg to acknowledge receipt of your letter of date and in reply I confirm what is written therein subject to correction in the event of there being any mistake.

Yours faithfully.

I shall give your clients instructions in the matter for purchase of ready goods.

The plaintiffs thus got an acknowledgement of a sale, as pakka adatias, of 4,000 tons of linseed on account of the defendant. It is to be noted however that when the plaintiffs deal with Bombay constituents, they usually employ a broker: see for example the evidence of the partner in Narrondas Rajaram and Co. and the agency by which the 39 contracts for sale of linseed in this case were effected. It does not seem clear that the incidents of the pakka adat relationship should be assumed to apply to the contracts of plaintiffs and defendant of which the evidence affords no trace of an agreement between the parties. The case however has been tried on the footing that the plaintiffs were pakka adatias of the defendant and we will deal with it on that footing. A correspondence was then commenced:

Bombay, 9th September 1910.

Burjorji Ruttonji Bomonji Dubash, Esq.

Sir,

Our clients Messrs. Bhagwandas Parashram have placed in our hands copy of a letter dated 31st ultimo addressed by their former solicitors to you regarding 4,000 tons of linseed which you had instructed to sell as per particulars given in the said letter and requiring you to place our clients in a position to give delivery of the said linseed of the quantity agreed to be sold by you and your reply thereto of the same date intimating that you would give instructions to our clients for the purpose of ready goods or buying by forward contract. As our clients have not received any instructions nor any margin-money from you, we are now instructed to call upon you to furnish margin-money amounting to Rs. 80,000 which with the sum of Rs. 61,000 already deposited by you as margin-money makes the sum of Rs. 1,41,000 which is the approximate difference between the market rate of today and the price at which you have contracted to sell the goods and to give you notice that unless within four days from the receipt hereof by you our clients receive the said margin-money or sufficient quantity of goods or you make

arrangements satisfactory to our clients to meet the contracts on due date, our clients reserve their right to make arrangements for closing the transaction by purchase of ready goods or by forward contracts as they may think proper holding you liable for all costs, charges and expenses incidental thereto.

Yours truly,

(Sd.) Bicknell Merwanji and Romer.

Bombay, 12th September, 1910.

Messrs. Bicknell Merwanji and Romer,
Solicitors, Bombay.

Dear Sirs,

Re Bhagwandas Parashram and myself.

Your letter of 9th September came to my hands on Saturday evening at 7 at Chowpatty. I am afraid your clients have not laid all true facts before you, otherwise you would not have written the letter under reply. Hence I do not think it advisable to reply.

Yours faithfully,

(Sd.) Burjor R. Bomanji.

Bombay 14th September, 1910.

Burjor R. Bomanji, Esq.

Sir,

Bhagwandas Parashram v. Yourself.

We have communicated the contents of your letter of the 12th instant to our clients.

Our clients state they have placed all true facts before us and have also placed the correspondence that has passed between you and them as well as their former attorneys' letter to you of the 1st ultimo and your reply thereto of the same idem. If you, however, maintain that our clients have not placed all true facts before us, will you please state what the true facts are as alleged by you?

Our clients state that our letter of the 9th instant had been addressed to you in respect of the linseed transactions only but we find from the letters addressed by you to them that you have entered into transactions of purchase of cotton for March next delivery and that at the time these transactions were entered into, you had agreed to deposit with them margin-money and had agreed to deposit further margin-money if the amounts deposited by you from time to time proved insufficient to cover the differences. That as to cotton transactions you authorized them to enter into transactions for sale of cotton for March delivery against the cotton purchased and that by reason of the counter-contracts cotton transactions resulted in profits payable to you in March next but at your request our clients have after deducting discount, brokerage and commission thereout credited to your account the balance of Rs. 5,804-2-3 and sent you an acknowledgment through broker Makanji and retained the amount with themselves with your consent as further margin on account of linseed transactions.

That when the market for linseed went up beyond the limits of the deposit, our clients asked for further deposit and you from time to time promised to pay the same but you did not do so except as to the aforesaid sum of Rs. 5,804-2-3 which you caused to be credited

as aforesaid and our clients state that since you received our letter of the 9th instant you had an interview with our clients when you informed them that you would not deposit any margin nor give any definite reply till due date of delivery and since our letter under reply our clients state that the market has gone up still further with the result that to cover them a further margin of one lakh has to be deposited by you with them under the arrangement and that they cannot wait further.

We are therefore instructed to give you this notice that unless within 24 hours from the receipt hereof by you, you deposit a further sum of rupees one lakh, or comply with the requisitions contained in our said letter of the 9th instant, our clients reserve their right to proceed in manner intimated by our said letter.

Yours truly,

(Sd.) Bicknell Merwanji and Romer.

Bombay, 28th September 1910.

Messrs. Bicknell Merwanji and Romer,
Solicitors, Bombay.

Re Bhagwandas Parashram.

Dear Sirs,

In reply to your letter of the 14th instant, I beg to state that I am sorry that I could not reply to your letter earlier than now.

Will you let me know to what letter you refer in para. 2 of your letter?

After knowing that I shall be in a position to give a detailed reply to your letter.

Yours truly,

(Sd.) Burjorji R. Bomanji.

Bombay, 29th September 1910.

[Burjorji R. Dubash, Esq.]

Sir,

Referring to previous correspondence addressed by us to you on behalf of our clients Messrs. Bhagwandas Parashram, we are instructed by our clients to remind you that the last day for giving delivery of linseed under the contract entered into by our clients as your pakki adat agents on your behalf is the 30th instant, but that you have not yet made an arrangement for giving delivery of the said goods. Our clients have purchased 300 tons for ready delivery on your account and risk and provision has to be made for 3,700 tons more.

We are therefore instructed by our clients to call upon you to provide for 3,700 tons of linseed to be given delivery of by the 30th instant within due time and to give notice that in default of your compliance with the aforesaid requisition, our clients will, as your pakki adat agents, take such steps towards the fulfilment of the contract as they may think proper according to the market rate of that day.

Yours truly,

[(Sd.) Bicknell Merwanji and Romer.]

Bombay, 1st October 1910.

Burjor R. Bomanji, Esq.

Dear Sir,

In continuation of our previous correspondence, we are instructed by our clients Messrs.

Bhagwandas Parashram to inform you that the contracts for 4,000 tons deliverable on your behalf yesterday were dealt with by our clients as follows:

By purchase of 300 tons at Rs. 13-15-0 as intimated in our letter of the 29th ultimo and 350 tons at Rs. 13-8-0, 2575 tons at Rs. 13-9-3, 700 tons at Rs. 13-9-0 and 75 tons at Rs. 13-8-10½ per cwt.

The account of the amount payable by you will be made up and forwarded to you in due course.

Yours truly,

(Sd.) Bicknell Merwanji and Romer.

On 30th September, an interview took place at defendant's house between Hargopal and a member of the plaintiff's firm and defendant and a friend in the presence of a concealed short-hand writer. From the report of the conversation on that occasion which has been proved, it appears that the plaintiffs admitted that the purchase of 300 tons ready, (which defendant denied he had authorized), was done for the purpose of the Court's proceedings. Turning now to the surrounding circumstances proved on behalf of the plaintiffs, we find that on the occasion of each contract for sale of linseed by the defendant, they employed brokers to make small contracts (39 in all) with various Marwari firms for the sale of linseed aggregating that sold by the defendant. In each case the contract was in the same form, of which one of the conditions was not to be delivered to Messrs. N. R. & Co.' N. R. & Co. means Narrondas Rajaram & Co. It is explained by one of the partners in this firm that they always insist on delivery of produce contracted for, being large exporters, and, that is, why the Marwaris boycott them in contracts of the class under consideration.

The plaintiffs produce entries in their books to show that they have paid to the various Marwaris, with whom the contracts for the sale of linseed by which they covered themselves were made, the differences due on 3,700 tons, but the 300 tons was the only linseed actually delivered. Of these two main facts appearing in the plaintiff's evidence, the clause in the contracts relating to Narrondas Rajaram & Co. is in favour of the defendant's contention. The learned Judge says that the contracts both selling and buying are made in the first instance as between the pakka adatia and his client and that therefore the plaintiffs in form were the

purchasers from the defendant of the whole 4,000 tons and in form it was the plaintiffs who sold to the 39 buyers under the covering contracts that amount of linseed.

According to the decision in *Bhagwandas v. Kanji* (1), which has been taken, in both Courts, as correctly stating the customary incidents of the business of a pakka adatia, the contracts of the plaintiffs with both seller and buyers must be regarded as being not only in form but also in substance independent contracts, for the pakka adatia may at any time decide to set off one set of contracts, not against those which may have been their occasion and cause, but against some other contracts altogether. The selling client can never claim as of right the benefit of any covering contracts entered into on the same day as his sales but is always bound to be content with the personal guarantee of the adatia. If then he can never claim advantage from any simultaneous contracts involving to another constituent of the adatia the reverse of his own operations, how can it in fairness be said that if he seeks to establish an intention to gamble, the existence of corresponding buyers on the other side of the adatia must always leave uncertain the issue as to the real common intention of the parties to his contract? There are in fact no parties to the selling contract but the client and his adatia who is the buyer. The adatia is not the disinterested broker. He is a party to the contract whose intention may well be known at the time of its inception. The learned Judge says that had this been a transaction between the defendant and the plaintiff's firm themselves, he should, in view of the evidence of the purchase of 300 tons of ready linseed bought for the Court's proceedings, and the virtual certainty that the plaintiffs knew exactly what the defendant had in view, have been disposed to hold that neither plaintiffs nor defendant at any time had the intention of either giving or taking delivery; but considering they immediately passed all the contracts on to numerous other purchasers, there was no room left for such a conclusion. But if, as we think it must be assumed, there was no privity between the defendant and the

(1) [1906] 30 Bom. 205=7 Bom.L.R. 611.

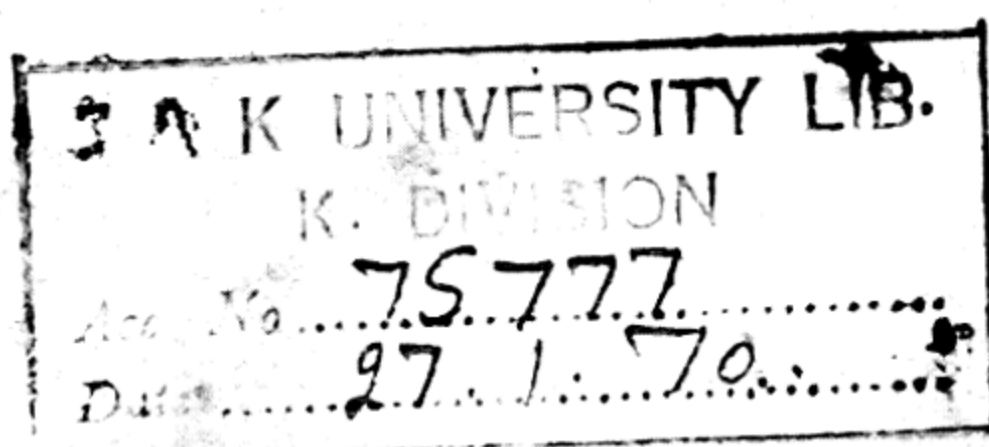
39 buyers, their existence is only relevant if it affords an indication of the intention of the plaintiffs at the time of the defendant's contracts. But the condition in 39 contracts, barring delivery to Narrondas Rajaram & Co., is, we think, indication of intention that delivery should not be called for. If this is the correct inference, the payments to the 39 buyers, assuming them to have been seriously made, must be attributed to that form of sporting honour which leads Marwaris to pay up their gambling differences so long as they have money to do so. We are of opinion that the

sub-contracts considering their conditions are not sufficient indication of an intention on the part of the plaintiffs to call for delivery from the defendant while all the other circumstances which have been alluded to point to the conclusion that the common understanding was as deposed to by the defendant that he and the plaintiff should deal in differences and settle in that way.

We reverse the decree of the lower Court and dismiss the suit and the counter-claim with costs.

G.P./R.K.

Decree reversed.



END

